Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

NAT SCHLESINGER, A.K.A. NAFTULE SCHLESINGER, A.K.A. ZVI POLLACK, and GOODMARK INDUSTRIES, INC.,

Petitioners,

– v. –

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the Fifth Amendment violated when a series of conspiracies, which all terminated years apart when their individual objectives were achieved, is converted into a single conspiracy by merely alleging that the acts were all part of a scheme to defraud?[1]

Can the Fifth Amendment's standard of "proof beyond a reasonable doubt" be satisfied for the intentional crime of arson based solely upon the lack of any evidence that the cause of the fire was accidental?

Whether, under the mandates of the due process clause, individuals can conspire to commit an offense that is contingent upon unknown future events, such as the filing of insurance claims resulting from *accidental* fires.

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[1] The scope and urgency of this question are enlarged by the realization that conspiracy is one of the most frequently charged federal crimes.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Goodmark Industries, Inc., states that it has no parent companies or non-wholly owned subsidiaries.

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The Petitioners -- Nat Schlesinger and Goodmark Industries, Inc. -- respectfully request that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 30, 2008.

OPINIONS BELOW

To conscientiously conduct an inventory of the opinions rendered in this case is arduous. On March 18, 2005, Judge Arthur D. Spatt, in the Eastern District of New York, denied the Petitioners' pretrial motions. *United States v. Schlesinger*, 360 F. Supp. 2d 512 (E.D.N.Y. 2005). App.19.

Following the Petitioners' convictions, on June 8, 2005, the district court denied their motion for a judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. *United States v. Schlesinger*, 372 F. Supp. 2d 711 (E.D.N.Y. 2005). App.49.

Then, on October 7, 2005, the district judge denied the Petitioners' motion for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. *United States v. Schlesinger*, 390 F. Supp. 2d 274 (E.D.N.Y. 2005). App.81.

On July 17, 2006, the district court denied the Petitioners' motion for a new trial based upon newly discovered evidence. *United States v. Schlesinger*, 438 F. Supp. 2d 76 (E.D.N.Y. 2006). App.87. The court denied a subsequent motion for a new trial on July 26, 2006. *United States v. Schlesinger*, 439 F. Supp. 2d 255 (E.D.N.Y. 2006). App.165.

A panel of the Second Circuit affirmed the convictions and 15-year sentence on January 30, 2008. *United States v. Schlesinger*, No. 05-3021-cr, 261 Fed. Appx. 355, available at 2008 WL 244226 (2d Cir. 2008). The unpublished decision is available at App.1. The court simultaneously issued a published decision regarding the related forfeiture issues. *United States v. Schlesinger*, 514 F.3d 277 (2d Cir. 2008). App.15.

A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 20, 2008. App.173.

JURISDICTION

The Court of Appeals' judgment was entered on January 30, 2008. The Second Circuit denied rehearing by an order entered on March 20, 2008. The 90-day period for filing this petition for certiorari expires on June 18, 2008.

This Court's jurisdiction to review the Second Circuit's decision is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part, "[n]o person shall ... be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The central sequence of events that frames the issues presented by this Petition is unencumbered by any serious factual disputes. Thus, it can be introduced in a summary fashion.

Nat Schlesinger and his brother, Jack, operated a high-end clothing factory in the Williamsburg section of Brooklyn, New York, which predominantly employed other Holocaust survivors (A.717).[1] The manufacturing process involved shearing, dying, cleaning, and knitting cotton fabric. As a consequence, a lint-like "fuzz" collected about the plant, which was easily ignited (Tr.1870). The three-story building, which occupied a full city block, was filled with highly flammable materials.

Because of this combustible condition, 24 fires were reported at the large factory between 1987 and 1999. However, insurance claims were only filed in connection with five fires (Tr.82-83). And, each claim of loss was paid and distributed well before the next claim was made.

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[1] Nat Schlesinger, who grew up in Hungary, was forcibly taken from his home in 1944 and confined to a concentration camp in what is now the Czech Republic. After his liberation at the war's end, and enduring terrible personal hardship during the Hungarian Revolution, he eventually migrated to America. He married and had eight children (A.707-92).

For example, an accidental fire erupted in the factory on August 7, 1987. A claim filed with Commerce and Industry Insurance Company was paid by February of 1988. Then, *more than two years later*, there was another accidental fire on June 13, 1990. Final payments on the insurance claims were made by Fireman's Fund in December of 1990. Nearly a year later, a third fire accidentally occurred on September 3, 1991, which resulted in a claim filed with Lexington Insurance Companies. That claim was paid in March of 1992. Significantly, neither Nat Schlesinger nor anyone else was ever charged with arson regarding those accidental fires. *There was never any claim or evidence that they were intentionally set.*

Absolutely No Criminal Conduct Occurred for More than Six Years Between When the Prior Insurance Claim Was Paid Out and When Another Fire Broke Out in the Fabric Factory

More than six years elapsed without any claims being filed for damage caused by fires at the factory. During this extensive period of time, there was no suggestion that Nat Schlesinger conspired with anyone or engaged in any insurance fraud.

Then, on New Year's Eve of 1998, something happened that would change Nat Schlesinger's life forever. The factory closed at 5 p.m. because of the holiday, and no one was in the building. On that night, a fire broke out amidst rows of combustible clothing hanging on racks. The fire was extinguished and no one was injured (A.211).

The Fire Marshal's Investigation Revealed No Evidence of Arson

The New York City Fire Marshal determined that the fire originated on the third floor, but *could not ascertain its cause* (Tr.1417-18). The employees were allowed to return to work at the factory without any claim that the fire was caused by arson.

In addition, the insurance company, Atlantic Mutual, hired a private investigator, Thomas Russo, who inspected the factory and *found no evidence of arson* (Tr.681-83, 714) (emphasis supplied). Russo also found no cigarettes or random Acts of God to have caused the fire (Tr.708-10).

However, because he found no evidence of a heat source located under the area where the fire occurred, Russo simply concluded that the fire was not accidental (Tr.665-74, 712). But, he never investigated certain combustible and flammable chemicals used in the factory to treat finished goods (Tr.725-26). Moreover, he never interviewed members of the Fire Department, who were on the scene during the fire (Tr.737-41).

Three months after the fire, on March 1, 1999, a second Fire Marshal, Bernard Santangelo, opened an investigation instigated by the insurance company (Tr.1413, 1454). Santangelo primarily reviewed reports generated by Thomas Russo's office and the insurance company's electrical expert[2], and interviewed employees and firefighters (Tr.1442-45). He did not conduct any of the scientific testing often done in arson investigations (Tr.1465-66).

Since no accidental cause could be ascertained, Fire Marshal Santangelo eventually agreed with the private investigator that the fire must have resulted from arson (Tr.1444). This opinion was premised on a lack of proof, such as no finding of faulty wiring or evidence that smoking may have occurred in the area where the fire originated (Tr.1465). Based solely on their inability to find proof of any accidental cause, they concluded that the fire must have been intentional (Tr.1450).

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[2] Russo retained an electrical consultant to review the equipment in and around the area of the fire (Tr.758-59, 761-62). The consultant had no way of knowing if the area had been disturbed or altered because he inspected the factory more than a week after the fire (Tr.765-77). He ruled out any electrical causation for the fire, even though the circuit breaker cover was missing (Tr.774, 780). The consultant also never examined whether faulty wiring elsewhere in the factory might have caused the fire (Tr.781-85).

On October 1, 2003, a 34-count indictment was returned against Nat Schlesinger and his company, Goodmark Industries, Inc., in the Eastern District of New York, charging arson, use of fire to commit a felony, conspiracy, insurance fraud, and money laundering relating to the fires at the factory, as well as wholly unrelated creditors' fraud (A.49).

Defense counsel challenged the sufficiency of the indictment, chiefly because it charged five separate conspiracies in one count (A.105). Specifically, Count One alleged conspiracies involving the filing of fraudulent insurance claims arising out of the *five different fires* that occurred over 12 years -- 1987, 1990, 1991, 1998 and 1999 (A.56-64).

On April 11, 2005, the trial got underway before Judge Spatt and a jury. The government's arson case rested largely on speculation from the Fire Marshal and insurance company's witnesses, as well as highly questionable hearsay received in evidence through deeply estranged family members.[3]

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[3] After the trial, one critical prosecution witness confessed to a Rabbi that his claim that the Petitioner's son said "job well done" four days after the fire was a *lie*. He also admitted that he *conspired* with an estranged member of the Petitioner's family because of pressures exerted on him by that side of the family, which was aligned against the Petitioner (A.323, 489). The witness conceded his perjury to his family, as well as *several former prosecutors* whose advice he sought concerning his perjury (A.585, 589, 593, 641). With this powerful evidence in hand, defense counsel launched a Rule 33 motion, seeking a new trial (A.300). However, at the hearing, the witness recanted when faced with a possible perjury prosecution, and

Jury deliberations went on for *three days* with the jurors requesting information, readbacks or further instructions relating to the central arson charges (Tr.2952). Nat Schlesinger, who has always maintained his innocence, and Goodmark Industries were eventually convicted of all charges, except one count of creditors' fraud (A.963-68).[4]

"I Have Questions About [the Arson] Count. I Have Had it From the Beginning"

Following the verdict, Nat Schlesinger renewed his motion for a judgment of acquittal, under Rule 29. Defense counsel argued that the jurors were "inflamed by the overall bulk of the case" and urged that evidence of other fires, which were barred by the statute of limitations, played a significant role in this verdict. He indicated that a fair assessment of the evidence failed to produce sufficient proof to sustain the charges of arson (A.222).

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the Rule 33 motion was denied. *United States v. Schlesinger*, 438 F. Supp. 2d 76 (E.D.N.Y. 2006). App.87.

[4] Counts 24 and 28, charging creditors' fraud, were erroneously included in the judgment even though they were never submitted to the jury (Tr.2887, 2896).

Judge Spatt candidly revealed that he had "questions" about the arson counts. In fact, the judge acknowledged he had these reservations "from the beginning" (A.224). Despite his deep misgivings, on June 8, 2005, Judge Spatt denied the motion for a judgment of acquittal. *United States v. Schlesinger*, 372 F. Supp. 2d 711 (E.D.N.Y. 2005). App.49.

At sentencing, facts were assembled demonstrating Nat Schlesinger's outstanding character and reputation in the community for good deeds (A.707-92). Despite his remarkable background -- and the clear language of 18 U.S.C. § 3553 providing that a sentence should be no greater than necessary to achieve the goals of our criminal justice system -- this *great-grandfather was sentenced to imprisonment of 15 years*! (A.969-70).[5]

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[5] Judge Spatt imposed concurrent sentences of 60 months (5 years) on all counts to run consecutive to the mandatory 120-month sentence (10 years) imposed for use of a fire to commit a felony, in violation of 18 U.S.C. § 844(h)(1). The arson count also carried a mandatory 5-year term of incarceration. The Petitioner was sentenced to supervised release of 3 years (A.968-71). Goodmark Industries and Nat Schlesinger were ordered to pay restitution of $7,525,566.60 and subjected to forfeiture of $21,195,665.74, through judgments issued on August 2, 2006 and August 4, 2006, respectively (A.964, 977-1001).

On January 30, 2008, the Second Circuit affirmed. App.1.[6] In rejecting objections to the amalgamated arson conspiracy, the court held that "[i]n effect, the indictment alleged that an ongoing business at that location was insurance fraud." App.5. The court also found that the evidence was sufficient to sustain the arson conviction in part because "two investigators (an insurer's expert and the New York City Fire Marshal) testified to their conclusions that the fire was set intentionally." App.6-7. Rehearing was denied. App.173.

Nat Schlesinger, who is 71 years old, will be left to die in prison in Otisville, New York, unless this Court reviews his case.

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[6] Jacobs, C.J., Parker and Wesley, JJ.

REASONS FOR GRANTING CERTIORARI

I. THE SECOND CIRCUIT'S RULING, WHICH REDEFINES THE SCOPE AND PARAMETERS OF CONSPIRACY PROSECUTIONS, INVOLVES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW, AND CONFLICTS WITH THE LAW OF OTHER CIRCUITS

This case calls radically into question the scope and parameters of the conspiracy doctrine left open by the Court in *United States v. Jimenez Recio*, 537 U.S. 270 (2003).[7] Specifically, the recurring question is when does a conspiracy to commit insurance fraud terminate? This Court has never addressed this issue, which is one of mounting importance to prosecutors and defendants throughout the country.

Until recently, the rule in the Second Circuit was that a conspiracy to defraud an insurance company terminates when the conspirators receive their economic benefits. *United States v. Mennuti*, 679 F.2d 1032, 1035 (2d Cir. 1982). That rule, which has been endorsed by other circuit courts[8], is based upon

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[7] *Jimenez Recio* was the first case in which this Court addressed the bounds of conspiracy prosecutions since the seminal case of *Grunewald v. United States*, 353 U.S. 391 (1957), was decided more than 50 years ago. In *Jimenez Recio*, the Court held that a conspiracy does not automatically terminate when the government defeats its object. 537 U.S. at 275.

[8] *See, e.g., United States v. Girard*, 744 F.2d 1170, 1172-73 (5th Cir. 1984); *United States v. Xheka*, 704 F.2d 974, 986 (7th

the principle that a conspiracy continues "until its aim has been achieved, it has been abandoned, or otherwise terminated." *United States v. Rucker*, 586 F.2d 899, 906 (2d Cir. 1978).

Nevertheless, in affirming the Petitioner's conspiracy conviction, the Second Circuit adopted a brand new rule: A conspiracy to commit fraud can continue well after its objective is achieved based solely upon the possibility that similar conduct may occur again in the future.

As a powerful illustration of the dangerousness of this precedent, the Petitioner was charged with insurance fraud in connection with an accidental fire in his fabric factory in 1991. Since the allegedly fraudulent insurance claim was completely paid by March of 1992, the conspiracy terminated at that point. Nevertheless, the Second Circuit found that the completed insurance claim was part of a "single continuous scheme" because, *more than six years later*, an independent claim was filed with a different insurance company for a fire that occurred on December 31, 1998.

Cir. 1983), *abrogated on other grounds*, *United States v. Durrive*, 902 F.2d 1221 (7th Cir. 1990); *United States v. Helmich*, 704 F.2d 547, 549 (11th Cir. 1983).

In fact, five separate alleged conspiracies, stemming from five different fires, occurring over a 12-year time period, involving five distinct claims of loss filed with five separate insurance companies, were all crowded into a single count of the Petitioners' indictment, and alleged to be part of a single conspiracy.

Under the Second Circuit's new rule, terminated conspiracies, separated by six years, can be revived by linking them together through the device of alleging a "single continuous scheme," despite the *absence of any evidence of a continuing intent or any overt acts between the unrelated claims.* Therefore, the court has radically redefined the law of conspiracy.

However, the rationale of the presiding rule is at once clear and remarkably simple: A conspiracy ends when its objective is achieved and the conspirators divide the proceeds. It makes absolutely no difference if one claim or a dozen claims are involved. Put more bluntly, a terminated conspiracy is, indeed, dead. A prosecutor should not be allowed to resurrect a dead conspiracy -- and *extend the statute of limitations* -- by tying it to unrelated conspiracies that occurred up to 12 years later.

"We Will View with Disfavor Attempts to Broaden the Already Pervasive and Wide-Sweeping Nets of Conspiracy Prosecutions"

Significantly, in *Grunewald v. United States*, 353 U.S. 391, 404 (1957), this Court condemned a similar expansion of the already over-inflated conspiracy doctrine. There, the Court, in words that resonate even today, noted that "we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."[9]

In adopting a restrictive approach, whereby the duration of a conspiracy would not be extended through acts of concealment, the *Grunewald* Court reasoned that any other approach would "open the very floodgates" that cases such as *Krulewitch v. United States*, 336 U.S. 440 (1949), warned against.[10] The Court further acknowledged that it

> cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the

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[9] *Id.*

[10] In *Krulewitch*, the Court cautioned that a broad interpretation of conspiracy could have far-reaching results and expand the bounds of a conspiracy prosecution well beyond reason. 336 U.S. at 443.

> conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.[11]

We urge, most respectfully, that certiorari is necessitated to determine whether the principles of *Grunewald* should bar a prosecutor's efforts to enlarge conspiracies that have achieved their central criminal purpose. Or, can they be expanded merely because similar conduct may eventually occur again in the distant future.

These are clearly propositions of the highest importance that have become seriously unsettled by the Second Circuit's decision. The circuit's holding, if left standing, constitutes a significant and unprecedented expansion of the volatile conspiracy doctrine. Thus, this Petition is accompanied by every compelling argument that has ever been made for ensuring that claims made by defendants who have been denied due process do not escape ultimate review.

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[11] *Grunewald*, 353 U.S. at 405.

Conspiracy is One of the Most Frequently Charged Federal Crimes

The recurring nature of this chronic question is underscored by the realization that conspiracy is one of the most frequently charged federal crimes.[12] As so incisively recognized by Judge Learned Hand, conspiracy is the "darling of the modern prosecutor's nursery."[13] In fact, *2,246 defendants* were charged with criminal conspiracy in federal district courts during the 2006 fiscal year.[14]

Not surprisingly, commentators have observed that the "[p]opularity of conspiracy law among federal prosecutors may be explained in part by the procedural and evidentiary advantages conferred by adding a conspiracy count."[15] These include "special rules pertaining to the venue in which the prosecution may be brought, an exception to the hearsay rule, and the 'wide latitude' given to the

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[12] *See* Ira P. Robbins, *Guilty Without Charge: Assessing the Due Process Rights of Unindicted Co-Conspirators*, Federal Courts Law Review (Jan. 2004). The "crime is charged very often; of that there can be little question." Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Even More Troubling Area*, William & Mary Bill of Rights Journal (Spring 1992).

[13] *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

[14] *See* Federal Justice Statistics Database Dataset: Defendants in Criminal Cases Filed in U.S. District Courts, Fiscal Year 2006, available at *http://fjsrc.urban.org/index.cfm* (visited June 17, 2008).

[15] Kathleen F. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 University of Cincinnati Law Review 431, 453 n.79 (1983).

prosecution in establishing the relevance of circumstantial evidence."[16] Therefore, this Court must carefully consider any judicial interpretation that endows prosecutors with even greater latitude in drafting conspiracy indictments.

This issue is of growing concern to judges, prosecutors and defense attorneys throughout the country, who are frequently participating in prosecutions involving multiple or extensive conspiracies.

The Court Should Resolve the Developing Conflict Between the Second Circuit and the Fifth, Seventh and Eleventh Circuits

Review by this Court is further justified because the Second Circuit's radical approach is in direct conflict with the Fifth, Seventh and Eleventh Circuits, which universally hold that a fraud conspiracy is concluded when the proceeds are ultimately distributed.[17] As a result, prosecutors in those circuits are barred from corralling a series of unrelated criminal acts into a single conspiracy count. However, such a startling result can -- and has been -- achieved in the Second Circuit under the primacy of the Petitioners' decision, which we ask this Court to review.

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[16] *Id.*

[17] *See Girard*, 744 F.2d at 1172-73; *Xheka*, 704 F.2d at 986; and *Helmich*, 704 F.2d at 549.

Now, through the elusive device of conspiracy, prosecutors can override historic bars to criminal prosecutions, such as statutes of limitations and laws forbidding the misjoinder of unrelated charges, as well as the shackling together of unconnected defendants. All of these injustices can be done under the guise of a single conspiracy if the law barring the inclusion of multiple conspiracies in a single conspiracy is not settled across the nation.

In addition, more criminal actions are commenced against defendants in the combined Eastern and Southern Districts of New York than in any of the other 94 federal districts.[18] Accordingly, the Second Circuit's deviant approach is certain to have a drastic effect on the due process rights of thousands of defendants, and has created an urgent need for this Court's guidance concerning the scope of a conspiracy prosecution.

In light of the sharp difference of interpretation regarding the constraints placed upon conspiracy prosecutions, consideration by this Court is essential to secure a badly needed uniformity in this area of the law.

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[18] *See* Annual Report of the Director: Judicial Business of the United States Courts, Table D, statistics relating to actions commenced in 2005, available at *http://www.uscourts.gov/judbus2006/appendices/d0d.pdf*.

The only exceptions are portions of Texas and Virginia.

II. IMPORTANT AND RECURRING QUESTIONS OF FEDERAL LAW ARE PRESENTED BY THE DECISION WHICH CALLS INTO DOUBT THE FIFTH AMENDMENT'S REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Review by this Court is also needed to resolve the critical question of whether the Fifth Amendment's standard of "proof beyond a reasonable doubt" can be satisfied for the charge of arson based solely upon a lack of evidence that the cause of the fire was accidental. Put another way, where there is absolutely no evidence that a fire was intentionally set, can a defendant be convicted of arson and subjected to the *mandatory 5 and 10-year sentences required under the federal arson and use of fire statutes*[19], based upon a fire inspector's speculation that something criminal must have occurred because he could not find an accidental cause for the fire.

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[19] The arson statute, 18 U.S.C. § 844(i), provides, in part, that whoever "maliciously damages" by "means of fire" any building "used in any activity affecting interstate or foreign commerce" shall be imprisoned for "not less than 5 years and not more than 20 years." Similarly, 18 U.S.C. § 844(h)(1) provides that whoever "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States" shall be sentenced to imprisonment for 10 years in addition to the punishment provided for the underlying felony.

Nearly 40 years ago, this Court held that the Fifth Amendment's due process clause requires that a person charged with a crime must be proven guilty "beyond a reasonable doubt." *See In re Winship*, 397 U.S. 358 (1970). This procedural safeguard deserves the high position it occupies in our hierarchy of constitutional values.

Nevertheless, the decision from the Second Circuit -- one of the most populous circuits in the country -- sustaining the Petitioner's arson conviction in the absence of any proof of arson, seriously threatens nearly a half-century of wisdom accumulated under *In re Winship*.

Now, in a tragedy that may well have been written by Franz Kafka, a defendant can be convicted and condemned to prison based purely upon speculation without any evidence that a crime actually occurred. But, if that is to become the law, then such a radical departure from the standard of proof in criminal cases should come from this Court.

The Quantum of Proof Necessary to Establish an Intentional Crime is a Recurring Question that Extends to Virtually all Federal Criminal Prosecutions

The continuing nature of this controversy is reflected in the fact that 16,582 arson prosecutions are brought each year.[20] But, the issues presented by this Petition *extend to all intentional offenses* that, until now, have consistently required proof beyond a reasonable doubt of a specific intent to commit a criminal act. Moreover, the profound policy implications of this controversial decision are at once apparent and harrowing in their consequences. As such, all of the growing public concerns regarding the continued viability of the due process clause have now been distilled into a single case. Thus, this Petition provides an ideal platform for resolving these deeply troubling and perennial questions.

One of the most cherished policies of our nation is that all persons are entitled to a fair trial. Central among those great constitutional provisions is the Fifth Amendment's requirement that a crime be proven beyond a reasonable doubt. This right to due process needs constant guarding. If we stand by and allow it to be reduced and degraded, then we will have weakened one of the most essential safeguards for generations to come.

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[20] *See Sourcebook of Criminal Justice Statistics*, Table 4.1.2006, available at *http://www.albany.edu/sourcebook/pdf/t412006.pdf*.

As a consequence, review by this Court is needed at this time.

III. WHETHER INDIVIDUALS CAN CONSPIRE TO COMMIT AN OFFENSE THAT IS CONTINGENT UPON UNKNOWN FUTURE EVENTS -- SUCH AS AN ACCIDENTAL FIRE -- IS A CRITICAL QUESTION OF BROAD INTEREST THAT IS WORTHY OF REVIEW

Finally, the Court is presented with the compelling question of whether individuals can conspire to commit an offense that is *contingent upon accidental or unknown future events*. Put more precisely, the Second Circuit affirmed the Petitioner's conviction for conspiring to commit insurance fraud based upon claims filed relating to *accidental* fires that occurred at his factory.[21]

However, we urge that one can only be convicted of conspiracy if he knows the unlawful objective of the conspiracy. Moreover, commission of a crime like arson cannot be the object of a conspiracy when a fire is recklessly caused. An intentional result is an essential element of the crime.[22] Surely, this question also warrants a grant of certiorari.

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[21] Only one of the five fires was charged as an arson.

[22] *See, e.g., State v. Beccia*, 199 Conn. 1, 505 A.2d 683 (1986).

CONCLUSION

For the foregoing reasons, the Petitioners pray that a writ of certiorari issue to review the Second Circuit's opinion in this case.

June 18, 2008

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of January, two thousand eight,

PRESENT: Hon. DENNIS JACOBS, *Chief Judge,*
Hon. BARRINGTON D. PARKER, Hon. RICHARD C. WESLEY, *Circuit Judges.*

UNITED STATES,

Plaintiff-Appellant,

– v. –

NAT SCHLESINGER, A.K.A. NAFTULE SCHLESINGER, A.K.A. ZVI POLLACK, AND GOODMARK INDUSTRIES, INC.,

Defendants-Appellees.

05-3021-cr, 05-5839-cr,
06-3551-cr, 06-3555-cr

Appearing for Appellant:

HERALD PRICE FAHRINGER, Fahringer & Dubno (Erica T. Dubno and Jeremy T. Gutman, *on the brief*), New York, NY.

Appearing for Appellee:

CYNTHIA M. MONACO, Assistant United States Attorney (Roslynn R. Mauskopf, United States Attorney, Eastern District of New York, *on the brief*, Peter A. Norling, Lawrence Ferazani and Richard Lunger, *of counsel*), United States Attorney's Office for the Eastern District of New York, Brooklyn, NY.

Appeal from the United States District Court for the Eastern District of New York (Spatt, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED.**

Defendants-Appellants Nat Schlesinger and Goodmark Industries, Inc., appeal from judgments of conviction entered on August 4, 2006 and August 2, 2006, respectively, in the Eastern District of New York (Spatt, *J.*).

We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review. Schlesinger was convicted on twenty-eight counts of mail fraud conspiracy, substantive mail and wire fraud, money laundering conspiracy, and substantive money laundering. Schlesinger was also convicted of arson in connection with a December 31, 1998 fire, in violation of 18 U.S.C. § 844(i), and for the use of fire to commit a felony, in violation of 18 U.S.C. § 844(h)(1). Goodmark was convicted on twenty-two counts of mail and wire fraud conspiracy and substantive mail and wire fraud. In a separate opinion issued today, we decide one issue of forfeiture; the rest of the appellate issues are considered below.

1. The District Court allowed Schlesinger's nephew to testify that he overheard Schlesinger's son say to Schlesinger, soon after the 1998 fire, "job well done." "Objections to admission of hearsay statements are reviewed for clear error." *United States v. Desena,* 260 F.3d 150, 157 (2d Cir. 2001).

The District Court reasoned that the statement was not hearsay, as it was a co-conspirator statement under Federal Rule of Evidence 801(d)(2)(E). The District Court found, by a preponderance of the evidence, that a conspiracy existed between Schlesinger and his son to

commit arson and to file a fraudulently-inflated insurance claim, and that the son's statement ("job well done") was in furtherance of that conspiracy. That finding was not clearly erroneous.

As to the finding of a conspiracy, the son, a close relative, worked for the business at the premises that burned down, and the testimony is that the comment was made after the son saw the damage caused by the 1998 fire, as if the fire was a "happy thing." Another witness, Israel Schwimmer, testified that he saw father and son together removing multiple bags of documents from the premises the day before the fire.

As to the finding that the comment was in furtherance of the conspiracy, the District Court explained that the statement itself appears to have been part of conspirators' efforts to "inform each other as to the progress or status of the conspiracy," and was therefore made in furtherance of that conspiracy. *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 88 (2d Cir. 1999) (internal citation omitted). Functionally, the statement would assess the arson as suitable to support an inflated insurance claim, which was the next stage of the conspiracy.

2. Defendants argue that the indictment was duplicitous because Count One (alleging conspiracy to commit mail and wire fraud) alleged multiple conspiracies in a single count, and because Counts Two through Twenty-One incorporate by reference the charging language of Count One. "[A]cts that could be charged as separate counts of an

indictment may instead be charged in a single count if those acts could be characterized as part of a single continuing scheme." *United States v. Tutino,* 883 F.2d 1125, 1141 (2d Cir. 1989).

Count One charged conspiracy to commit mail fraud by submitting inflated insurance claims for five fires at the same location. In effect, the indictment alleged that an ongoing business at that location was insurance fraud. *United States v. Aracri,* 968 F.2d 1512, 1522 (2d Cir. 1992) (finding "ample evidence of a single conspiracy through which the name of the companies in a 'daisy chain' changed but the conspiracy's goal of avoiding taxes did not"). As to the incorporation by reference of the charging language of Count One into subsequent counts, that is expressly permitted. *See* FED.R.CRIM.P. 7(c)(1).

3. Defendants argue that the superseding indictment should be dismissed (or alternatively, a new trial ordered) because the original indictment was under seal for seventeen months. Citing *United States v. Deglomini,* 111 F.Supp.2d 198 (E.D.N.Y. 2000), Defendants contend that undue delay in unsealing an indictment should be considered *per se* unreasonable under the Sixth Amendment.

"[W]hen a sealed indictment has tolled the statute of limitations, the policy of repose underlying the statute demands that the Government unseal the indictment as soon as its legitimate need for delay has been satisfied." *United States v. Watson,* 599 F.2d 1149, 1154 (2d Cir. 1979); *see also United States v. Srulowitz,* 819 F.2d 37, 40 (2d Cir. 1987) ("[W]hen the

defendant can demonstrate substantial actual prejudice occurring between the date of sealing and the date of unsealing, the expiration of the limitations period before the latter event warrants dismissal of the indictment."). But here, no statute of limitations ran while the original indictment was under seal, and the charges in the superseder were timely when it was unsealed. The prejudice cited here is that an alleged co-conspirator who died while the indictment was under seal "may have proven helpful at trial." We need not decide whether this event would be consequential if its effect were not speculative.

4. Schlesinger challenges the sufficiency of evidence to convict him of arson and the use of a fire to commit a felony. A defendant challenging the sufficiency of the evidence "bears a heavy burden." *United States v. Griffith,* 284 F.3d 338, 348 (2d Cir. 2002). "Not only must the evidence be viewed in the light most favorable to the government and all permissible inferences drawn in its favor, but if the evidence, thus construed, suffices to convince any rational trier of fact of the defendant's guilt beyond a reasonable doubt," the conviction must stand. *United States v. Martinez,* 54 F.3d 1040, 1042 (2d Cir. 1995) (internal citations omitted).

"[C]rimes may be proven entirely by circumstantial evidence." *United States v. Sureff,* 15 F.3d 225, 228 (2d Cir. 1994). Here, two investigators (an insurer's expert and the New York City Fire Marshal) testified to their conclusions that the fire was set intentionally.

As noted above, another witness saw Schlesinger and his son remove bags of documents from their offices at the property the day before the fire. The doors to the premises — and to third floor shipping area, where the fire was set — were locked when firefighters arrived. Schlesinger and his brother Jack held the only keys to the third floor shipping area. And Schlesinger, who submitted the (inflated) claim thereafter, had a motive to commit the arson.

5. Schlesinger argues that his conviction should be reversed because the government refused to provide a bill of particulars naming the unidentified co-conspirators referenced in the indictment. Specifically, Schlesinger contends that his defense was blindsided when it was revealed at trial that "John Doe # 7," the congratulator on the "job well done," was Schlesinger's son.

A bill of particulars is merited "only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." *United States v. Torres,* 901 F.2d 205, 234 (2d Cir. 1990) (quoting *United States v. Feola,* 651 F.Supp. 1068, 1132 (S.D.N.Y. 1987), *aff'd,* 875 F.2d 857 (2d Cir. 1989)). "Whether to grant a bill of particulars rests within the sound discretion of the district court." *United States v. Panza,* 750 F.2d 1141, 1148 (2d Cir. 1984). "So long as the defendant was adequately informed of the charges against him and was not unfairly surprised at trial as a consequence of the denial of the bill of particulars, the trial court has not abused its

discretion." *Torres*, 901 F.2d at 234 (quoting *United States v. Maull*, 806 F.2d 1340, 1345-46 (8th Cir. 1986)).

We see no reason to disturb the District Court's conclusion that a bill of particulars was not required here. The 52-page indictment details the facts and circumstances of the offenses. Moreover, the son's statement was included in the grand jury testimony, which Schlesinger received prior to trial. Schlesinger was not "unfairly surprised at trial" when that testimony was introduced. *Id.*

6. Schlesinger argues that the creditor fraud charges were misjoined with the insurance fraud charges, causing the "highly inflammatory proof" of his defrauding of creditors to taint the jury's view of him. The District Court denied Schlesinger's pretrial severance motion.

"The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged ... are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." FED. R.CRIM.P. 8(a).[1] Here, two fraudulent schemes involved the same participants, goals and means. Joinder was proper.

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[1] The briefs submitted by Schlesinger and the government both refer to Schlesinger's severance motion as one brought under Federal Rule of Criminal Procedure 8(a); however, in the court below, Schlesinger sought severance under Rule 8(b). *See United States v. Schlesinger*, 360 F.Supp.2d 512, 522 (E.D.N.Y. 2005).

7. Schlesinger contends that the District Court erred in permitting two of Schlesinger's attorneys to testify for the government regarding their roles in the creditor fraud scheme.

"[T]here is a societal interest in enabling clients to get sound legal advice, [but] there is no such interest when the communications or advice are intended to further the commission of a crime or fraud." *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995). A district court can thus admit into evidence communications that would otherwise be protected by the attorney-client privilege where there "is probable cause to believe that the communications with counsel were intended in some way to facilitate or to conceal the criminal activity." *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986).

The District Court's thorough opinion explains that the communications at issue fell within this exception, and cites evidence that the lawyers enabled Schlesinger to buy out his companies' loans and then foreclose on those loans, thus precluding other creditors from reaching the companies' assets. The testimony was appropriately limited to the lawyers' involvement in Schlesinger's creditor fraud.

8. Schlesinger claims that it was improper for his trial to have taken place in the Central Islip courthouse rather than in Brooklyn. He emphasizes that the main events in this case — the five fires — took place in Williamsburg, Brooklyn, and he asserts prejudice by "being dragged out to the far end of Long Island for

his trial," to "a strange location where the culture was quite different and he was an alien to those who sat in judgment of him."

The Central Islip and Brooklyn courthouses are in the same venue, the Eastern District of New York. So, Schlesinger's claim seems to be premised on a purported violation of the Eastern District's Guidelines for the Division of Business Among District Judges. But those Guidelines provide that they "shall not be deemed to vest any rights in litigants or their attorneys." Rule 50.1(d). Moreover, the designation of the case to Central Islip was consistent with the Guidelines: a number of the insurance companies whom Schlesinger defrauded were located on Long Island, as was the auction company that sold Schlesinger's equipment in connection with his creditor fraud.

9. Schlesinger claims that the District Court's imposition of the mandatory minimum prison sentences for arson and the use of a fire to commit a felony (five years and ten years, respectively) violated the cruel and unusual punishment clause of the Eighth Amendment and the double jeopardy clause of the Fifth Amendment, and that a jury should decide whether such mandatory minimum sentences are imposed.

The mandatory minimum sentences at issue here do not violate the double jeopardy clause. The elements of the two offenses are not the same. *See United States v. Fiore,* 821 F.2d 127, 131 (2d Cir. 1987) ("Section 844(h)(1) requires proof of the commission of any felony (in this case mail fraud) which may be prosecuted in a

court of the United States, something not required by Section 844(i). Section 844(i) requires proof of damaging a building involved in interstate commerce, something not required by Section 844(h)(1)." (internal quotation marks and citation omitted)).

10. Defendants challenge the District Court's order of forfeiture on several grounds.

First, Defendants argue that the District Court impermissibly shifted the burden of proof by ordering the forfeiture of the gross amount received as a result of the mail and wire fraud, as opposed to the net proceeds. The mail and wire fraud crimes were "unlawful activities," as defined by 18 U.S.C. §§ 1956(c)(7), 1961(1). The civil forfeiture provision (made applicable to mail and wire fraud by 28 U.S.C. § 2461) calls for the forfeiture of all "proceeds" of unlawful activities; "proceeds" are "not limited to the net gain or profit realized from the offense." 18 U.S.C. § 981(a)(2)(A). So, the wording of the statute forecloses Defendants' interpretation.

Second, Schlesinger argues that the District Court erred in determining that the arson premises were "involved in" money laundering and therefore subject to forfeiture. The relevant statute mandates that a defendant forfeit "any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1). Evidence at trial showed that Schlesinger deposited the proceeds of his insurance and creditor fraud into the business operating accounts of the companies he ran at the premises, and the proceeds were then used to

pay the companies' monthly lease and tax expenses. Accordingly, the premises "served as a conduit for the proceeds of the illegal transactions," making it subject to forfeiture. *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 486 (2d Cir. 1995).

Third, Schlesinger argues that the District Court erred in ordering the forfeiture of certain funds twice — once as proceeds of mail and wire fraud and once as property involved in money laundering. We disagree. Criminal forfeiture is a form of punishment. *See Libretti v. United States*, 516 U.S. 29, 39, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995) ("Congress plainly intended forfeiture of assets to operate as punishment for criminal conduct in violation of the federal drug and racketeering laws, not as a separate substantive offense."). Schlesinger's fraud and money laundering are two offenses impacting two distinct sets of victims. "The 'victims' of fraud counts are those persons who have lost money or property as a direct result of the fraud. The 'victim' of money laundering is, by contrast, ordinarily society at large." *United States v. Napoli*, 179 F.3d 1, 7 (2d Cir. 1999) (internal citation omitted). Schlesinger does not deny that he is subject to separate sentences for the fraud counts and the money laundering counts; consequently, the proceeds of those crimes are subject to separate orders of forfeiture.

Schlesinger seeks an offset of the funds traceable to the sale of the premises (the Wallabout Property) against the net proceeds from the sale of that property. The government has advised that it does not object to such offset, provided that

no third party makes a successful claim against the net proceeds from the sale. Since the parties have the same views as to how the forfeiture process will be conducted, we express no view as to that aspect of the forfeiture order.

We have reviewed Defendants' remaining arguments and find them to be without merit.

Finally, a motion was made, and denied, for the filing of a late reply brief. Thereafter, a motion for reconsideration was made. We grant the motion to reconsider, and we grant the motion to file the reply brief.

For the reasons set forth above and in the companion opinion, the judgment of the district court is hereby **AFFIRMED.**

FOR THE COURT:

CATHERINE O'HAGAN WOLFE

By: _____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: Nov. 28, 2007 Decided: Jan. 30, 2008)

Docket Nos. 05-3021-cr(L), 05-5839-cr(CON), 06-3551-cr(CON), 06-3555-cr(CON)

UNITED STATES OF AMERICA,

Appellee,

– v. –

NAT SCHLESINGER, A.K.A. NAFTULE SCHLESINGER, A.K.A. ZVI POLLACK, AND GOODMARK INDUSTRIES, INC.,

Defendants-Appellants.

Before: JACOBS, *Chief Judge*, B.D. PARKER, WESLEY, *Circuit Judges*.

Nat Schlesinger appeals from a judgment of conviction entered in the Eastern District of New York (Spatt, J.) Schlesinger argues that 28 U.S.C. § 2461(c) (2005) did not authorize the criminal forfeiture of the proceeds of his mail and wire fraud offenses. For the following reasons, we affirm the judgment below.

HERALD PRICE FAHRINGER, Fahringer & Dubno (Erica T. Dubno and Jeremy T. Gutman, *on the brief*), New York, NY, *for Defendants-Appellants*.

CYNTHIA M. MONACO, Assistant United States Attorney (Roslynn R. Mauskopf, United States Attorney, Eastern District of New York, *on the brief*, Peter A. Norling, Lawrence Ferazani and Richard Lunger, *of counsel*), United States Attorney's Office for the Eastern District of New York, Brooklyn, NY, *for Appellee*.

PER CURIAM:

Nat Schlesinger appeals from his August 2, 2006 conviction in the Eastern District of New York (Spatt, J.) on a variety of arson and fraud charges. In a separate summary order filed today, we reject a number of Schlesinger's challenges to his conviction and sentence, as well as challenges raised by co-defendant Goodmark Industries, Inc. This opinion considers — and rejects — Schlesinger's argument that the District Court lacked the statutory authority to order the criminal forfeiture of the proceeds of his mail and wire fraud offenses.

Schlesinger was convicted on seventeen counts of mail fraud (in violation of 18 U.S.C. § 1341) and two counts of wire fraud (in violation of 18 U.S.C. § 1343). The District Court ordered that Schlesinger criminally forfeit the proceeds of those offenses pursuant to 28 U.S.C. § 2461(c) (2005). That subsection (which was amended in 2006) provided:

> If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation

> *but no specific statutory provision is made for criminal forfeiture upon conviction,* the Government may include the forfeiture in the indictment or information....

28 U.S.C. § 2461(c) (2005) (emphasis added). Schlesinger relies on the highlighted clause. As Schlesinger notes, a "specific statutory provision is made for criminal forfeiture upon conviction" for mail and wire fraud: 18 U.S.C. § 982(a)(2)(A). *Id.* Moreover, as Schlesinger points out, that provision authorizes criminal forfeiture only in connection with mail and wire fraud "affecting a financial institution," a circumstance the parties agree is not present here. 18 U.S.C. § 982(a)(2)(A). It follows, argues Schlesinger, that neither § 2461(c) nor § 982(a)(2)(A) authorizes the criminal forfeiture of the proceeds of his mail and wire offenses, and the government thus falls between two stools.

As the District Court concluded, § 2461(c) is not so limited: The forfeiture at issue was effected under 18 U.S.C. § 981, which authorizes civil forfeiture for mail and wire fraud, and which does not have the special circumstances requirement of § 982. *United States v. Schlesinger,* 396 F.Supp.2d 267, 273-79 (E.D.N.Y. 2005); *see United States v. Razmilovic,* 419 F.3d 134, 136 (2d Cir. 2005) ("Section 2461(c) thus authorizes criminal forfeiture as a punishment for any act for which civil forfeiture is authorized, and allows the government to combine criminal conviction and criminal forfeiture in a consolidated proceeding."); *United States v. Jennings,* 487 F.3d

564, 584 (8th Cir. 2007); *United States v. Vampire Nation*, 451 F.3d 189, 199 (3d Cir. 2006). For essentially the reasons stated by the District Court, we affirm the order of forfeiture.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

NAT SCHLESINGER, also known as "Naftule Schlesinger" and "Zvi Pollack," HERMAN NIEDERMAN, and GOODMARK INDUSTRIES, INC.,

Defendants.

MEMORANDUM OF DECISION AND ORDER
Cr. No. 02-485(ADS)(ARL)

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SPATT, District Judge.

This case involves charges of conspiracy to commit insurance fraud and creditor fraud, and arson. On October 1, 2003, a grand jury entered a 34 count Superseding Indictment ("Indictment") against defendants Nat Schlesinger ("Schlesinger"), Herman Niederman ("Niederman"), and Goodmark Industries, Inc. ("Goodmark") (collectively the "Defendants"), arising out of, among other things, a series of fires dating back to 1987 that occurred at a factory in the Williamsburg section of Brooklyn. Presently before the Court are the following motions by the Defendants: (1) a motion to dismiss Count One, Twenty, and Twenty-Two through Thirty-Four of the Indictment; (2) a motion to sever Counts Twenty-Three to Thirty-Four from the remaining Counts; (3) a motion to sever defendant Niederman; (4) a motion to grant a bill of particulars; (5) a motion to suppress evidence; and (6) a motion to transfer the location of the trial.

BACKGROUND

I. Summary of Alleged Facts

The following facts are taken from the Indictment and the Government's response to the Defendants' motions. Schlesinger owned and maintained a place of business with his brother, Jack Schlesinger, in a building that was identified at various times as: (1) 48-76 Wallabout Street, Brooklyn, New York; (2) 50 Wallabout Street, Brooklyn, New York; (3) 750 Kent Avenue, Brooklyn, New York; and (4) 1 Classon Avenue, Brooklyn, New York ("the Premises"). Apparently, the various addresses for the same building are due to the fact that the Premises occupied an entire city block and had multiple entrances.

The Premises was designed and equipped as a clothing manufacturing factory. Schlesinger and his brother operated numerous clothing manufacturing companies in this location from the time they purchased the building in the early 1980's. These companies included Pous Apparel, Inc. ("Pous Apparel"), Private Brands of Delaware, Inc. ("Private Brands") and the defendant Goodmark. The indictment alleges that the brothers jointly exercised total control over each company but masked their ownership of the various companies to conceal their fraudulent schemes. One scheme involved defrauding insurance companies by submitting fraudulent claims for losses resulting from a series of fires that occurred at the Premises from 1987 to 1999.

The second scheme involved using Private Brands and Goodmark as a vehicle to defraud various creditors. The Court will discuss each scheme separately.

A. The Alleged Insurance Fraud Scheme

On August 7, 1987 a fire occurred at the Premises, which at the time was doing business under the name Pous Apparel. At the time of the fire Schlesinger was listed as the vice-president of the company. The indictment alleges that Schlesinger, along with his brother, controlled the company. Schlesinger hired Jack DuBoff and Associates ("DuBoff"), a public adjusting firm located in Valley Stream, New York, to negotiate Pous Apparel's claim for loss resulting from the fire. The indictment alleges that Schlesinger agreed to pay Duboff a cash bribe in exchange for an inflated and false claim to Pous Apparel's insurance company. Upon receipt of the fraudulent proof of loss, the insurance company paid the claim in the amount of $1,065,000. The money was deposited in the account of Pous Apparel. Schlesinger paid Duboff the cash bribe, and Duboff distributed the cash to the other co-conspirators.

In June of 1990 and September 1991, a second and third fire occurred at the Premises, which at the time was doing business as Private Brands. At various times, Schlesinger listed himself as director, executive vice-president, vice-president, and owner of Private Brands. The indictment further alleges that Schlesinger owned and controlled the day-to-day operations of the company. As with the first fire, Schlesinger hired DuBoff to negotiate the claims resulting from the losses.

Similarly, it is alleged that Schlesinger agreed to pay Duboff a cash bribe in exchange for an inflated and false claim to Private Brands' insurance companies. Upon receipt of the fraudulent proofs of loss, the insurance company paid the claims in the amount of $2,510,980. The money was deposited in the account of Private Brands. Schlesinger paid Duboff the cash bribes, and Duboff distributed the cash to the other co-conspirators.

On December 31, 1998 a fourth fire (the "1998 Fire") occurred at the Premises, now doing business as Goodmark. Schlesinger hired Horizon International Group, Ltd. ("Horizon"), a public adjusting company located in New York, New York, to represent Goodmark in connection with the insurance claims relating to that fire. On January 19, 1999, Schlesinger prepared a cost estimate from a fictitious company called "G.I.I. Engineering Co." to repair knitting machines. Schlesinger also solicited the help of defendant Herman Niederman who at the time was the President of House of Kids, Inc., a corporation located in Brooklyn, New York, which was engaged in the business of manufacturing clothing. In February 1999, Niederman, with the help of an employee of Dryesburg Corporation, provided Schlesinger with inflated quotes for fabric. Schlesinger provided Horizon with the G.I.I. Estimate and the Dryersburg Letter in support of a preliminary claim for damages totaling $4,092,319.84. Horizon prepared and submitted claims to Atlantic Mutual Insurance Company ("Atlantic Mutual").

Atlantic Mutual retained the services of Thomas J. Russo Consultants, Ltd. ("TJR Consultants"), a cause and origin expert located in Williston Park, New York, in order to examine the fire scene and determine the cause and origin of the 1998 Fire. Atlantic also retained the services of Stoner and Company, Inc. ("Stoner"), a salvor located in Bohemia, New York, to determine the amount of loss and damage to the inventory at the Premises as a result of the 1998 Fire. A salvor's responsibilities include verifying an insured's inventory counts and values submitted in support of the claim for damaged goods, and selling the damaged goods for the insurance company. TJR consultants determined that the 1998 Fire originated on the third floor shipping area of the Premises and was intentionally set. In addition, the New York City Fire Department fire marshal concluded that this fire was intentionally set and labeled the fire an arson. Further, upon arrival of the New York City Fire Department, the building was found locked with no indication of forced entry.

The indictment charges that Schlesinger, along with John Doe # 7 whose identity is known to the grand jury, deliberately caused the 1998 Fire to be set for the purpose of submitting the false and inflated insurance claim to Atlantic Mutual totaling approximately $4,590,000 in insurance benefits. Atlantic Mutual declined to pay the claim because it concluded that the fire was intentionally set. On March 16, 2001, Schlesinger filed a lawsuit against Atlantic Mutual seeking to recover damages caused by the 1998 Fire.

On August 3, 1999, a fifth fire occurred at the Premises. Schlesinger and his brother still owned the company under the name Goodmark. Schlesinger retained the services of Horizon to negotiate Goodmark's claim with the insurance company Crum and Forster Indemnity Company. Schlesinger again allegedly submitted fraudulent documentation from co-defendant Niederman regarding the value of damaged fabrics, as well as other fraudulent documents in order to defraud the insurance company. After receiving the proof of loss, the insurance company paid the claim in the amount of $934,319. The funds were deposited into the Goodmark bank account.

B. The Alleged Creditor Fraud Scheme

1. Private Brands

In September of 1996, Private Brands had substantial financial obligations to various lien and judgment holders and creditors (collectively "creditors"). These obligations included: New York State and New York City tax judgments in excess of $630,000; an Internal Revenue Service lien in excess of $570,000; a bankruptcy court judgment in excess of $1,200,000; a civil suit with a potential judgment in excess of $250,000; and a debt to Brooklyn Union Gas Co., for approximately $75,000.

In 1987, the French American Bank ("FAB") issued a revolving line of credit to Private Brands in the amount of $2,000,000, which was collateralized by certain assets, including machinery, equipment, and inventory. In July 1996, Schlesinger and others, arranged for and

caused C.C. Calabria, Inc. ("Calabria"), a real estate holding company, to purchase the loan Private Brands owed to FAB. Schlesinger allegedly hired an attorney, Edwin Schwimmer, to create a paper trail to make it appear as though Calabria did in fact purchase the FAB loan. However, Schlesinger provided the funding for Calabria to assume the loan, making it falsely appear as if Calabria was an independent purchaser of the FAB loan. A substantial portion of the funding came from a company known as Selective Properties, Inc.

After Calabria obtained the loan from FAB, Schlesinger and others arranged for Calabria to foreclose on the FAB loan and obtain title to all assets of Private Brands through public auction, effectively making Private Brands judgment proof. In September of 1998, following the transfer, Calabria leased the equipment to Goodmark, which was operating an identical business as Private Brands, in the same location, controlled by Schlesinger and his brother. The Government alleges that Calabria's principal had nothing to do with any of the foregoing transactions and would sign documents at the direction of Schlesinger. Edwin Schwimmer, the attorney representing Calabria, stated that he never spoke with anyone other than Schlesinger regarding the transaction and any signatures required for the transaction were provided by Schlesinger.

It is further alleged that Schlesinger, along with others, made false representations to Atlantic Mutual regarding Private Brands collateral purportedly damaged in the 1998 Fire. Specifically,

Schlesinger represented that the collateral was owned by Goodmark, which was the named insured on the Atlantic Mutual policy. Schlesinger supported these misrepresentations by forwarding documents relating to Calabria's assumption of the FAB loan and the subsequent foreclosure sale of the collateral to Goodmark.

Allegedly, Schlesinger made it appear as if Private Brands and Goodmark were unrelated entities by placing nominees in official positions at Goodmark, including the defendant Niederman as secretary. In fact, Schlesinger and his brother were at all times in control of both Private Brands and Goodmark. Using the name "Pollack," Schlesinger attempted to avoid collection of the $75,000 debt owed by Private Brands to Brooklyn Union Gas by falsely representing that Goodmark was unrelated to Private Brands. This same false representation was made in letters signed in the name of Niederman as secretary of Goodmark.

2. Goodmark

As of September 2000, Goodmark had substantial financial obligations to various lien and judgment holders including: New York State tax judgments in excess of $50,000; a debt of approximately $162,000 owed to Jordan Yarns, Inc.; a debt of approximately $35,000 owed to Metromedia Energy, Inc.; a debt of approximately $24,000 owed to Econnergy Energy Company, Inc.; and a debt of approximately $20,000 owed to Heller Financial (collectively "creditors").

Schlesinger and Goodmark, together with others, allegedly executed fraudulent transactions designed to make it falsely appear to the Goodmark creditors that title to certain assets of Goodmark had been conveyed to Western Industries, Inc. ("Western Industries"), a corporation formed by Schlesinger and located at 263 Classon Avenue, Brooklyn, New York. This was done to make Goodmark appear to be judgment proof.

In September 1998, Bank of America ("BOA") issued a revolving line of credit to Goodmark in the amount of $1,500,000. The BOA loan was collateralized by certain Goodmark assets, including Private Brands collateral obtained from Calabria, machinery, equipment and accounts receivable. In August 2000, Schlesinger hired attorney Stephen Einstein to represent Western Industries and negotiate an assumption of the debt owed by Goodmark to BOA in the amount of $750,000. Schlesinger provided the funding for Western Industries to assume the BOA debt, making it falsely appear as if Western Industries was an independent purchaser of the loan. Approximately $450,000 of the funding provided to Western Industries consisted of checks that had been issued to Goodmark by its customers and deposited into an escrow account maintained by the attorney's law firm. Approximately $250,000 of the funding provided by Schlesinger to Western Industries consisted of a check from Sweater Brands, Inc., a company operated by a coconspirator whose identity is known to the grand jury.

In October 2000, Schlesinger arranged for Western Industries to foreclose on the BOA loan and obtain title to the Goodmark collateral through public auction. In August 2001, Schlesinger caused the Goodmark collateral to be sold by Western Industries at a public auction conducted by Kostar Industries, Inc., located at 555 Broadhollow Road, Melville, New York. The net proceeds of the auction totaled approximately $45,000 and were deposited into the account of Western Industries. Schlesinger then caused two checks totaling $45,000 to be issued from the Western Industries account made payable to Sweater Brands, Inc.

DISCUSSION

I. Motion to Dismiss

A. The Statute of Limitations Defense as to the Conspiracy Alleged in Count One

In Count One of the Indictment, Schlesinger is charged with conspiring to defraud various insurance companies, in violation of 18 U.S.C. § 371, by submitting fraudulently inflated claims for loss resulting from fires occurring at his clothing manufacturing businesses in 1987, 1990, 1991, 1998, and 1999. Schlesinger argues that each fraudulent insurance claim must be treated as multiple conspiracies, rather than one ongoing conspiracy, which would result in the fraudulent claims submitted regarding the 1987, 1990, and 1991 fires being time-barred by the statute of limitations.

The applicable statute of limitations for an action brought under § 371 is five years. 18 U.S.C. § 3282. "In order for the conspiracy charge alleged in Count [One] to fall within the statute of limitations, (1) the conspiracy must still have been ongoing within the five year period preceding the indictment, and (2) at least one overt act in furtherance of the conspiratorial agreement must have been performed within that period." *U.S. v. LaSpina,* 299 F.3d 165, 173 (2d Cir. 2002) (quotations omitted); *see also Grunewald v. United States,* 353 U.S. 391, 396-97, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957); *United States v. Ben Zvi,* 242 F.3d 89, 97 (2d Cir. 2001). In this case, the Superseding Indictment was the first indictment to allege a conspiracy relating to the fires that occurred before 1998. This indictment was returned on October 1, 2003 and therefore, the conspiracy must have continued until at least October 1, 1998.

In this case, the Indictment alleges that Schlesinger and his brother, along with various co-conspirators, were engaged in a single ongoing conspiracy in which they agreed to file fraudulently inflated insurance claims. The important question here is whether each fraudulent claim was a completed conspiracy, which does not continue the conspiracy for statute of limitations purposes, or whether each claim was the continuation of a single conspiracy. "Whether the Government has proven the existence of the conspiracy charged in the indictment and each defendant's membership in it, or instead, has proven several independent conspiracies is a question for a properly instructed jury." *U.S. v. Sattar,* 314 F.Supp.2d 279, 311 (S.D.N.Y. 2004); *see United States v. Johansen,*

56 F.3d 347, 350 (2d Cir. 1995); *United States v. Trippe,* 171 F.Supp.2d 230, 238 (S.D.N.Y. 2001); *U.S. v. Vondette,* 248 F.Supp.2d 149, 162 (E.D.N.Y. 2001); *see also U.S. v. Berger,* 224 F.3d 107, 114 (2d Cir. 2000) (stating that whether a single conspiracy or multiple conspiracies exist is a question of fact for a properly instructed jury).

Here, the Indictment sufficiently alleges one conspiracy coming within the five year statute of limitations. The Indictment states:

> The defendant, NAT SCHLESINGER, together with others, devised and executed a scheme to defraud insurance companies by submitting and causing to be submitted false and inflated insurance claims ... seeking a total of approximately $9,000,000 in insurance benefits to cover losses purportedly caused by fires at the Premises in 1987, 1990, 1991, 1998 and 1999.

Superseding Indictment ¶ 18.

"[A] single conspiracy is not transposed into a multiple one simply by lapse of time, change in membership, or a shifting emphasis on its locale of operations." *U.S. v. Aracri,* 968 F.2d 1512, 1521 (2d Cir. 1992) (quoting *United States v. Nersesian,* 824 F.2d 1294, 1303 (2d Cir. 1987)). Furthermore, "a single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance." *Aracri,* 968 F.2d at 1521 (quoting *U.S. v. Maldonado-Rivera,* 922 F.2d 934, 962 (2d Cir. 1990)).

Count One of the Indictment lists 34 overt acts from 1987 to 1999 covering the time period of the alleged single conspiracy. The final overt act in this conspiracy occurs on December 10, 1999 when Schlesinger allegedly deposited the proceeds of a disbursement from an insurance claim filed for losses sustained in the 1999 Fire. This act falls within the five-year statute of limitations. As such, the Indictment sufficiently alleges a single ongoing conspiracy to commit insurance fraud within the five year statute of limitations. Therefore the motion to dismiss Count One of the Indictment with regard to the statute of limitations defense is denied.

B. The Alleged Impermissible Invasion of the Attorney-Client Privilege as to the Creditor Fraud Counts Twenty-Two through Thirty-Four

Counts Twenty-Two through Thirty-Four allege that the Defendants, along with others, devised and executed schemes to defraud creditors of Goodmark and Private Brands. Schlesinger argues that the Government impermissibly obtained evidence from two attorneys hired by Schlesinger and Goodmark in violation of the attorney client privilege and their Sixth Amendment right to counsel. Schlesinger seeks dismissal of the indictment based on these grounds.

"Grand jury proceedings carry a 'presumption of regularity.'" *United States v. Torres,* 901 F.2d 205, 232-33 (2d Cir. 1990) (citing *Hamling v. United States,* 418 U.S. 87, 139 n. 23, 94 S.Ct. 2887, 2918 n. 23, 41 L.Ed.2d 590 (1974)) (internal quotations and citations omitted). Further, "'as a

general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants.'" *Id.* (quoting *Bank of Nova Scotia v. United States,* 487 U.S. 250, 254, 108 S.Ct. 2369, 2373, 101 L.Ed.2d 228 (1988)).

Even if Schlesinger's contentions are correct, the alleged violations of the attorney-client privilege before the grand jury do not give rise to the type of Government misconduct that would require dismissal of the indictment. *See, e.g., U.S. v. Colasurdo,* 453 F.2d 585, 596 (2d Cir. 1971). (holding that a preliminary hearing was unnecessary to determine whether the grand jury had heard evidence in violation of the attorney-client privilege). Whether or not the evidence is privileged is better examined in the context of the trial. "Otherwise, before trial on the merits there would always be a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury, with resultant delay." *Colasurdo,* 453 F.2d at 596. Thus, the Court finds that under these circumstances dismissal of the indictment on this ground is unwarranted.

C. Sufficiency of Evidence as to Arson in Count Twenty

It is well-settled that a federal defendant may not challenge a facially-valid indictment on the ground that it is based on insufficient evidence. *United States v. Williams,* 504 U.S. 36, 54-55, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992); *United States v. Casamento,* 887 F.2d 1141, 1182 (2d Cir. 1989); *U.S. v. Butler* 351 F.Supp.2d 121, 126

(S.D.N.Y. 2004). Here, the defendant makes no argument that the Indictment suffers from a facial defect. Thus, the motion to dismiss Count Twenty is denied.

II. Joinder of Offenses and Defendants

The Indictment charges the Defendants in two separate conspiracies, that is, the insurance fraud and the creditor fraud scheme. The Defendants argue that joinder of these conspiracies was improper, and move: (1) to sever under Fed.R.Crim.P. 8 Counts Twenty-Three to Thirty-Four of the superseding indictment from the remaining counts on the ground that joinder is improper; and (2) to sever defendant Niederman pursuant to Fed.R.Crim.P. 12(b) and 14(a) on the ground that he will be unduly prejudiced if tried jointly with Schlesinger.

A. Rule 8(b)

Where, as here, defendants in a multi-defendant case challenge joinder of offenses and defendants, the motion is construed as arising under Rule 8(b). *See United States v. Turoff,* 853 F.2d 1037, 1043 (2d Cir. 1988). It is well-settled that Rule 8(b) governs the joinder of two or more defendants in the same indictment. *United States v. Feyrer,* 333 F.3d 110, 113 (2d Cir. 2003). Rule 8(b) states:

> The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts

> or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed.R.Crim.P. 8(b).

The effect of analyzing joinder of multiple defendants and counts under Rule 8(b), rather than 8(a), ensures that multiple defendants are only tried together if "the charged acts are part of a series of acts or transactions constituting an offense or offenses." *Turoff*, 853 F.2d at 1043.

In *United States v. Attanasio*, 870 F.2d 809 (2d Cir. 1989), the Second Circuit interpreted Rule 8(b) to mean that the acts must be "unified by some substantial identity of facts or participants, or arise out of a common plan or scheme." *Id.* at 815 (citing *United States v. Porter*, 821 F.2d 968, 972 (4th Cir. 1987)).

The Government argues that joinder of the various financial frauds is proper because all the criminal conduct arises from the defendant Schlesinger and his brother's ownership and control of several successive clothing manufacturing factories located at the same Premises. In addition, all of the conduct involves the defendant and his brother masking their ownership and control of their various entities through the use of nominee principals and companies to commit their financial frauds. On the other hand, Schlesinger argues that the creditor fraud allegations are clearly separate and distinct from the insurance fraud count and that

the two schemes bear no relationship to each other. In support of this contention, Schlesinger points out that the parties are not the same and that judgment creditors are nowhere to be found in the insurance fraud and arson counts.

While it is true that the two schemes bear little resemblance to each other, the Court finds that the schemes are linked by a substantial identity of facts and participants. All of the Defendants — Schlesinger, Niederman, and Goodmark — are charged in both schemes. In addition, as the Government points out, the two conspiracies both arise from the Defendants efforts at masking the fact that Schlesinger and his brother owned and controlled each of the clothing manufacturing businesses located at the Premises. Niederman's participation as Schlesinger's nominee with regard to Goodmark, which masked the identity of the true owners, was critical to both schemes. In addition, Niederman played a substantial role in the insurance fraud by submitting a false quote on fabric from Dryersberg. There is, therefore, a substantial identity of facts and participants.

B. Rule 14

Even if the Defendants are properly joined under Rule 8(b), a defendant may move for severance under Rule 14, which provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or

> by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendant or provide whatever justice requires.

Fed.R.Crim.P. 14

Under this rule, the decision to sever a joint trial "is committed to the sound discretion of the trial judge." *United States v. Blount,* 291 F.3d 201, 209 (2d Cir. 2002). There is a preference in the federal system for joint trials of defendants who are indicted together, *Zafiro v. United States,* 506 U.S. 534, 537, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993), and the Court should sever trials of co-defendants under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or lack of guilt. *Id.* at 539, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317; *United States v. Rahman,* 189 F.3d 88, 122 (2d Cir. 1999). Even if prejudice is shown, Rule 14 does not require severance. *See United States v. Haynes,* 16 F.3d 29, 32 (2d Cir. 1994). Rather, "limiting instructions often will suffice to cure any risk of prejudice." *Zafiro,* 506 U.S. at 539, 113 S.Ct. 933, 122 L.Ed.2d 317.

Niederman advances several arguments in favor of severance. First he argues that there is a risk that a jury would find "guilt by association" because both defendants are Hasidic Jews in the clothing manufacturing business. Second, he argues that there is a disparity in the amount of

evidence against him as compared to Schlesinger, and that such disparity in a complex case will confuse the jury. Finally, he argues that there will be antagonistic defenses raised at the trial.

Niederman's argument that the jury could find "guilt by association" merely because the two defendants are Hasidic Jews is unavailing. In *U.S. v. Loalza-Vasquez,* 735 F.2d 153, 159 (5th Cir. 1984), the United States Court of Appeals for the Fifth Circuit held that the district court did not abuse its discretion when it decided not to sever Spanish speaking defendants who all had Spanish surnames and similar appearances. The Fifth Circuit reasoned that the defendants were represented by different counsel; that the district court helped the jury distinguish the defendants; and that the district court gave limiting instructions prior to the introduction of the similar offense evidence and in the charge to the jury. *Id.; see, e.g., U.S. v. Berger,* 22 F.Supp.2d 145, 155 (S.D.N.Y. 1998) (denying motion to sever the trial of two Hasidic Jews). Here, the Court finds that these same protections against such "guilt by association" will be available at trial to protect Niederman from confusion with Schlesinger.

Second, the fact that Schlesinger and Niederman may have different degrees of guilt or face varying amounts of evidence does not require separate trials. *See United States v. Locascio,* 6 F.3d 924, 947 (2d Cir. 1993) ("[J]oint trials involving defendants who are only marginally involved alongside those heavily involved are constitutionally permissible."); *see also United States v. Hernandez,* 85 F.3d 1023, 1029 (2d Cir. 1996) ("The fact that one of several

codefendants is tried for a crime not committed by another codefendant does not, without more, create the sort of miscarriage of justice that would require a new trial.").

Finally, Niederman argues that the Defendants have antagonistic defenses. Niederman contends that his theory of defense is that he did not sign the letters and documents relating to the conspiracies, whereas Schlesinger seeks to point the finger at Niederman. "A trial need not be severed simply because codefendants raise conflicting defenses." *U.S. v. Blount,* 291 F.3d 201, 209 (2d Cir. 2002); *see, e.g., Zafiro,* 506 U.S. at 538-39, 113 S.Ct. 933, 122 L.Ed.2d 317. In fact, it seems likely that the jury would better understand each defendants' defense if presented at the same trial, rather than separate trials that might lead to conflicting interpretations of the same documents and evidence.

Moreover, it appears likely that the evidence at trial against each of the defendants is necessarily interrelated. According to the Government, proof of one scheme is indispensable for a full understanding of the other charged scheme, as well as the charged criminal enterprise as a whole. Niederman is an integral part of both schemes. Thus, severance would only result in the repetition of evidence that would have been admissible in any case against each of the defendants at a joint trial. *See United States v. Rosa,* 11 F.3d 315, 341 (2d Cir. 1993) ("Evidence at the joint trial of alleged co-conspirators that, because of the alleged conspiratorial nature of the illegal activity, would have been admissible at a separate trial of

the moving defendant is neither spillover nor prejudicial."); *United States v. Muyet,* 945 F.Supp. 586, 596 (S.D.N.Y. 1996) ("[E]ven if the Court were to grant severance, much of the evidence regarding ... codefendants' acts of violence would be admissible in ... [their] trial as proof of the existence and nature of the conspiracy.").

The Court finds that severance is not necessary in this case. To the extent that the evidence against one defendant may not relate to another, the Court will either redact or issue limiting instructions to cure any possible prejudice. *Zafiro,* 506 U.S. at 539, 113 S.Ct. 933, 122 L.Ed.2d 317. The Court will give appropriate limiting instructions to the jury, directing the jurors to consider the evidence as to each count of the Indictment and as to each defendant separately and that a verdict of guilty as to any defendant on any count should not in any way control the jury's verdict as to any other offenses charged. Similarly, to the extent that some of the evidence relating to arson may not relate to Niederman, the Court is still of the opinion that the jury will be able to separately evaluate the evidence, particularly following the limiting instructions. *Id.* Indeed, the Second Circuit has held that a multi-defendant trial is not beyond the "ken of the average juror." *United States v. Villegas,* 899 F.2d 1324, 1347 (2d Cir. 1990).

In sum, the Court finds that Schlesinger and Niederman have not demonstrated the existence of a serious risk that a joint trial will compromise a specific trial right or will prevent the jury from making a reliable judgment about guilt or lack

of guilt. *Zafiro,* 506 U.S. at 539, 113 S.Ct. 933, 122 L.Ed.2d 317; *Rahman,* 189 F.3d at 122. Accordingly, their request for severance pursuant to Rule 14 is denied.

III. Bill of Particulars

Schlesinger seeks a written bill of particulars on Counts One through Thirty-Four, claiming that the Indictment is too general to afford Schlesinger the opportunity to know the specific acts that he is accused of. Rule 7(f)"permits the defendant to seek a bill of particulars in order to identify with sufficient particularity the nature of the charge pending against him, thereby enabling [the] defendant to prepare for trial, [and] to prevent surprise...."*United States v. Bortnovsky,* 820 F.2d 572, 574 (2d Cir. 1987); *United States v. Oskowitz,* 294 F.Supp.2d 379 (E.D.N.Y. 2003).

To obtain a bill of particulars, the defendant must show that the charges of the indictment are so general that they do not advise him of the specific acts of which he is accused. *See United States v. Torres,* 901 F.2d 205, 234 (2d Cir. 1990); *United States v. Walsh,* 194 F.3d 37, 47 (2d Cir. 1999). The decision to grant or deny a defendant's request for a bill of particulars is within the sound discretion of the trial court. *United States v. Panza,* 750 F.2d 1141,1148 (2d Cir. 1984).

As the Second Circuit has stated in *Torres:*

> The function of a bill of particulars is to provide defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid

> prejudicial surprise at the trial. A bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused. Whether to grant a bill of particulars rests within the sound discretion of the district court. Acquisition of evidentiary detail is not the function of the bill of particulars. So long as the defendant was adequately informed of the charges against him and was not unfairly surprised at trial as a consequence of the denial of the bill of particulars, the trial court has not abused its discretion.

Torres, 901 F.2d at 234 (quotations and citations omitted).

The Court finds that the Indictment is sufficiently specific as to the essential elements of the allegations charged in the Indictment. Accordingly, the motion for a bill of particulars is denied.

IV. Motion to Suppress Evidence

Schlesinger has alleged that "one particular tape" that the Government will introduce at trial contains evidence showing that the Government was involved in, or acquiesced to a private citizen breaking into Schlesinger's office and stealing that tape in order to turn it over to the Government. The Government was unable to respond to Schlesinger's motion because it claims that none of the agents assigned to the case are familiar with

such an event. As such, the Court cannot determine whether the tape is admissible. Schlesinger may renew this motion when the tape can be sufficiently identified by the parties.

V. Location of the Trial

The Jurisdiction of the Eastern District of New York comprises the counties of Kings (also known as "Brooklyn"), Queens, Richmond (also known as "Staten Island"), Nassau, and Suffolk. 28 U.S.C. § 112. Under the Court's Guidelines for the Division of Business Among Judges ("Guidelines"), adopted pursuant to 28 U.S.C. § 137, cases are assigned to one of the two federal courthouses located in the District. One courthouse is located in Brooklyn, New York, while the "Long Island" Courthouse is located in Central Islip, New York. Both Courthouses can properly exercise jurisdiction over a case filed in the District. *See* 28 U.S.C. § 112(c). The Guidelines state that a criminal case shall be designated a "Long Island case" — and assigned to the Long Island Courthouse — if the crime was allegedly committed wholly or in substantial part in Nassau or Suffolk County. Cases shall be tried in the place it has been assigned except for an emergency.

Section 50.2(f) of the Guidelines permits a party to object to the designation of a judge or to the place of trial in a criminal case, within ten days from arraignment or from initial notice of appearance, whichever is earlier. However, the "rules are not intended to give the parties a right to litigate where a particular case will be tried, but merely provide the guidelines by which the Eastern District administratively handles and

assigns its cases." *United States v. Garces*, 849 F.Supp. 852, 861 (E.D.N.Y. 1994); *see also U.S. v. Astra Motor Cars*, 352 F.Supp.2d 370, 372 (E.D.N.Y. 2005); *United States v. All Funds on Deposit in Bus. Money Mkt. Account No. 028-0942059-66*, 319 F.Supp.2d 290, 293 (E.D.N.Y. 2004).

Here, Schlesinger objects to this case being designated a "Long Island Case" and tried in the Central Islip Courthouse. Schlesinger argues that the case has virtually no connection to Long Island and requests that the case be transferred to the Brooklyn Courthouse. In addition, Schlesinger argues that transfer is necessary in this case because there may be a viable challenge to the fair cross section of jurors available in the Long Island Courthouse. Schlesinger contends that "virtually all" of the Hasidic Jews live in Brooklyn. As discussed below, Schlesinger's arguments are without merit.

As an initial matter, the Court notes that Schlesinger's motion to change venue, dated February 11, 2005, is time-barred under the Guidelines. Schlesinger was arraigned in the Long Island Courthouse on October 9, 2003. However, to the extent that counsel for the defendant has just recently appeared in the case, the Court will address the substance of his request.

Schlesinger is correct to note that a majority of the events that gave rise to this case took place in Brooklyn, and that the Defendants reside in Brooklyn. However, there are sufficient connections to Long Island in this case. The Government contends that the Indictment arose out of prior investigations of the insurance industry on Long Island. In addition, the pending Indictment

contains allegations regarding mailings in furtherance of the criminal conspiracy to Suffolk County. DuBoff, One of the first conspirators in the insurance fraud scheme, operated his public adjusting firm out of Valley Stream, New York, which is located in Nassau County. In addition, the Court notes that the Indictment alleges that Schlesinger sold the Goodmark collateral at an auction held in Melville, New York, which is located in Suffolk County. Therefore, the Indictment clearly alleges that crimes were committed in substantial part in Suffolk County.

As for Schlesinger's contention that he will have a viable challenge to the jury selection process, the Court finds this contention speculative and without merit.

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979).

Jewish persons are a cognizable group for purposes of the first prong of the fair-cross-section requirement. *U.S. v. Gelb,* 881 F.2d 1155, 1161 (2d Cir. 1989). But Schlesinger has a formidable

task in proving the last two prongs. The much more restrictive previous Eastern District Jury Plan, which provided for a separate master jury wheel for trials in the Long Island Courthouse that included only residents of the two Long Island counties, withstood intense scrutiny. *U.S. v. Miller,* 116 F.3d 641, 656 (2d Cir. 1997); *In re Jury Plan of Eastern District of New York,* 27 F.3d 9, 9-10 (2d Cir. 1994) (outlining history of the Eastern District's jury selection plans).

The current Jury Plan makes no distinction between the jury pool available for Long Island cases and Brooklyn cases. Juror names for grand and petit jurors are selected at random from the voter registration lists of all the five counties within the Eastern District of New York, Kings, Queens, Richmond, Nassau, and Suffolk, supplemented by lists for these counties from the New York State Department of Motor Vehicles and other lists for the five counties. Schlesinger's argument that statistics will demonstrate that Long Island panels are predominately made up of Long Island residents, and therefore devoid of Hasidic Jews, is speculative and cannot justify a change of venue at this time. There is no reason to believe that Hasidic Jews, whether they reside in Brooklyn or Long Island, would not be called for service on this jury. Therefore, the Defendants request to change the location of the trial to Brooklyn, New York is denied.

CONCLUSION

Having reviewed the submissions of the parties, it is hereby

ORDERED, that the Defendants' motion to dismiss Count One, Twenty, and Twenty-Two through Thirty-Four of the Superseding Indictment is DENIED; and it is further

ORDERED, that the Defendants' motion to sever the trials of Counts Twenty-Three through Thirty-Four from the remaining Counts is DENIED; and it is further

ORDERED, that Niederman's motion to sever his trial from that of his co-defendants is DENIED; and it is further

ORDERED, that the Defendants' motion to grant a bill of particulars is DENIED; and it is further

ORDERED, that the Defendants' motion to suppress evidence is DENIED at this time, without prejudice; and it is further

ORDERED, that Schlesinger's motion to transfer the location of the trial is DENIED.

SO ORDERED

Dated: Central Islip, New York
March 18, 2005

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

NAT SCHLESINGER, also known as "Naftule Schlesinger" and "Zvi Pollack," HERMAN NIEDERMAN, and GOODMARK INDUSTRIES, INC.,

Defendants.

MEMORANDUM OF DECISION AND ORDER
Cr. No. 02-485(ADS)(ARL)

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SPATT, District Judge.

This criminal prosecution initially arose out of a series of fires that occurred from 1987 to 1999 at a clothing factory in the Williamsburg section of Brooklyn, New York. The factory was once a place where women's clothing was manufactured for sale to high end retailers such as Neiman-Marcus, Saks Fifth Avenue, and Bloomingdales. On New Year's Eve 1998, the factory was the scene of a suspicious fire in which a firefighter temporarily became lost deep inside the factory while battling the blaze. The investigation that followed resulted in a thirty-four count indictment against one of the owners of the business that occupied the factory on charges of arson, conspiracy, insurance fraud, creditor fraud, and money laundering.

On May 19, 2005, after a four week jury trial, the defendant Nat Schlesinger ("Schlesinger" or the "Defendant") was convicted of one count of arson and one count of use of fire to commit a felony in

connection with the December 31, 1998 fire (the "1998 New Year's Eve Fire"). In addition, Schlesinger was convicted of one count of conspiracy to commit mail and wire fraud with regard to insurance claims, thirteen counts of mail fraud, and two counts of wire fraud on the insurance claims, and one count of conspiracy to engage in monetary transactions with insurance fraud proceeds in connection with the scheme to fraudulently inflate insurance claims on the losses suffered as a result of the 1998 New Year's Eve fire and four other fires that occurred at the factory. This fraudulent scheme was carried out by the Defendant through the use of bribes and false documents involving fires spanning a period from 1991 to 1999.

Schlesinger was also convicted of one count of conspiracy, four counts of mail fraud, and three counts of engaging in monetary transactions with fraudulent proceeds resulting from a second scheme to defraud the creditors of the clothing manufacturing businesses that he controlled. This scheme involved the use of nominees and shell corporations to carry out what was, in effect, two self organized bankruptcies. The Defendant, who with his brother Jack Schlesinger, owned and controlled both companies involved, was able to transfer the assets and operations of a financially unstable company to an ostensibly new company. As a result, on two occasions the creditors of the businesses were deprived of their machinery and equipment collateral and left with judgment proof debtors.

At the conclusion of the trial the Defendant moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure on the counts of arson and use of fire to commit a felony. The Defendant contended that there was insufficient evidence at trial to support a conviction of arson and that the jury was improperly influenced by the evidence presented concerning the other counts. The Defendant also argued that an out of court statement allegedly related to the fire should have been excluded by the Court as inadmissible hearsay. At the conclusion of the Government's case, at the end of the entire case, and after the verdict the Court reserved decision on these Rule 29 motions. For the reasons set forth below, the motion is denied.

I. Background

Along with his brother Jack, the Defendant Nat Schlesinger owned and operated a place of business in the Williamsburg section of Brooklyn in a building that occupied an entire city block bordered by Wallabout Street, Kent Avenue, and Classon Avenue. The place of business was identified at various times as: (1) 48-76 Wallabout Street, Brooklyn, New York; (2) 50 Wallabout Street, Brooklyn, New York; (3) 750 Kent Avenue, Brooklyn, New York; and (4) 1 Classon Avenue, Brooklyn, New York ("the Premises"). The two brothers operated a clothing manufacturing company at this location beginning in the 1980's under the names Pous Apparel, Inc., Private Brands of

Delaware, Inc., and Goodmark Industries, Inc. At the time of the 1998 New Year's Eve Fire, the business was operating under the name Goodmark Industries, Inc.

The Premises was designed and equipped as a knit clothing factory. The three story building contained all the processes necessary to design and manufacture women's clothing. The first floor contained storage for the yarn as well as knitting, slicing, and framing machines. The second floor housed sewing and dying machines to wash, dye, and cut the fabric. The second floor also contained a design room and an office. That office was primarily occupied by Nat and Jack Schlesinger. The third floor was the shipping area where the clothes were stored, boxed, and eventually shipped out to the customers. The clothes were stored on the third floor by hanging them in aisles of racks or by storing them in boxes.

On Thursday, December 31, 1998, at about 10:30 p.m., a fire broke out in the third floor shipping area. On that day the factory had closed at 5:00 pm for the New Year's Eve holiday. Normally the factory operated twenty four hours a day, six days a week, and was only closed on Friday nights and Saturdays for religious reasons. At the trial, the following witnesses testified concerning the events leading up to the fire: (1) Jack Schlesinger's son-in-law Israel Schwimmer, (2) the manager of the third floor shipping department Abraham Weiser, and (3) Jack Schlesinger's son Victor Schlesinger.

Israel Schwimmer worked at Goodmark for several years. Schwimmer testified that on the day of or a day prior to the 1998 New Year's Eve fire he observed the Defendant and his son David removing about four or five bags of papers from the Defendant's file cabinets. Schwimmer testified that before he left on the day of the fire he stopped in to see Jack Schlesinger in the main office. While in the office he overheard a conversation between Abraham Weiser and the Defendant. Weiser told the defendant that he was going to lock up the third floor for the day. The Defendant told Weiser that he would take care of locking up the third floor that day. Israel Schwimmer left the building at about 5:00 pm that day and Jack and Nat Schlesinger remained at the factory in the second floor office.

Abraham Weiser had worked for the Defendant for approximately twelve years until the clothing business closed in 2000. At the time of the fire, Abraham Weiser was the supervisor of the shipping department located on the third floor. He was responsible for packing the manufactured garments in boxes to send by UPS or in bags via their own truck. Weiser testified that no other employees worked with him in the shipping area in December 1998. One of his responsibilities was to secure the two entrances to the third-floor shipping area and turn off the lights by closing the circuit breaker each night before he left. In fact, Abraham Weiser testified that it was his practice to secure both doors and turn off the circuit breaker

at the end of the day and that the only other people with keys to that floor were Jack and Nat Schlesinger. However, Abraham Weiser did not have keys to the exterior entrances of the factory.

Weiser testified that on December 31, 1998, he was the only person on the third floor during the day. He testified that he did not smoke; that smoking was not permitted in the building; and he did not observe anyone smoking on the third floor on the day of the fire. Weiser stated that he "wouldn't let them smoke" because he "can't take the smoke." Tr. at 616. Weiser further testified that there were no flammable liquids, thinners, dyes, linseed oils or the smell of smoke or any other unusual odor before he left on December 31, 1998. Weiser stated that occasionally a small cleaning gun was used on the third floor to remove stains from the finished garments. Weiser testified that on December 31, 1998, at about 4:00 p.m., he locked up the third floor and turned off the circuit breaker providing electricity to the third floor, locked both doors, and left the building.

Victor Schlesinger testified that he had maintained an office in the Premises on the second floor. Victor stated that he would typically visit the factory and his father Jack daily at the end of the day. He stated that he did not have keys to the factory but that the security guard would let him in. On the day of the fire, Victor went to his father's office and found his father with Nat. While in the office, Victor told his father that he wanted to come back to the building later that evening to get some work done. The Defendant overheard this request and told Victor, "No, you

are not coming back here." Tr. 1490. In response, Jack told Victor that he should listen to Nat and not return to the building. While this conversation was occurring, Victor observed Abraham Weiser enter the office and tell the Defendant and Jack that he was closing up the third floor. Victor testified that the Defendant told Weiser, "No, don't close up the third floor, I'm going to close it." Tr. 1491.

At about 10:30 pm on December 31, 1998, the New York City Fire Department received reports of a fire at the Premises. Several fire companies were dispatched and confirmed that there was visible fire coming from the third floor of the factory. All of the entrances to the Premises were locked and secure when the fire department arrived. The fire department forced entry into the factory and ascended the stairs to the third floor. At the top of the stairs they found that the entrance to the third floor was also locked and had to break down that door. Inside the third floor there was a smokey fire that was difficult to find. One of the firefighters became lost while searching for the fire and sent out a "mayday." The firefighter was quickly rescued and was unharmed by the incident.

The fire was eventually found to be located underneath a mezzanine that was constructed above the third floor. Under the mezzanine, clothes were hung from rows of racks. Above the mezzanine boxed goods were stored. Firefighters testified that in order to extinguish the fire they had to proceed through each of the rows of clothes under the mezzanine. Part of the mezzanine eventually collapsed due to the fire.

The investigation that followed revealed that the main body of fire was located under the mezzanine and that the boxes stored above the mezzanine were not charred as much as the goods stored below.

The New York City Fire Marshal was requested to go to the scene the night of the fire, but was unable to respond until the following Monday due to the New Year's holiday. On Monday, January 4, 1999, the Fire Marshal conducted a quick investigation and determined the cause of the fire to be "not ascertained." The Fire Marshal explained that due to lack of resources the investigator was unable to search under the partially collapsed mezzanine, and thus labeled the location of the fire as the third floor, origin unknown. After the Fire Marshal left the owners were allowed back inside the factory.

Israel Schwimmer and Victor Schlesinger both testified with regard to the events that took place the Monday following the fire, which was the first day the owners were allowed back into the factory. Israel Schwimmer testified that he went to the main office where he saw the defendant with Jack Schlesinger, Milton Jacobi, Abraham Weiser, and the Defendant's son, Sam Schlesinger. There Schwimmer overheard a conversation between Nat Schlesinger and his son Sam Schlesinger, who was an insurance claims adjuster. The Defendant told him to "put together a nice claim" and to "put everything, new fabric, old

fabric; whatever he could put in the claim." Tr. at 508-09. Schwimmer also recalled a conversation between the Defendant and his son David. This testimony was admitted without objection:

Q And what was that conversation?

A A week after the fire they were discussing the fire, the fire was good. A job well done.

Q Who said a job well done?

A David.

Q Who did he say that to?

A His father, Nat.

Q What did the defendant, Nat Schlesinger, say in response?

A We will wait for the claim that is going to go through.

Q Where were you when they were having this conversation?

A I was in the hallway out of the office.

Q Where was the defendant and his son, David Schlesinger?

A In the office.

Tr. at 510.

Victor Schlesinger testified that he observed substantial damage in the building and described it as a "whole mess." Tr. 507, 1493. When Victor went to see his father Jack in the second floor office that day, he found him with the Defendant. The Defendant was telling Jack Schlesinger to go slow in starting up the business because adjusters needed to come down and assess the damage. While they were in the office, the Defendant's son David Schlesinger entered the room and stated "job well done." Tr. 1500. Victor testified that the statement was made with bravado as a "happy thing," despite the fact that he was standing in the midst of the damage resulting from the fire. The Court notes that the testimony was erroneously transcribed as "bragado [sic], happy things," instead of "bravado." Tr. at 1500.

Israel Schwimmer also testified that he was in the second floor office when David Schlesinger entered proclaiming "a job well done." Tr. 510. Schwimmer testified that the Defendant replied to that statement by saying, "[w]e will wait for the claim that is going to go through." Tr. 510.

Testimony and evidence was offered by the Government showing that the Defendant submitted a fraudulent insurance claim to Atlantic Mutual Insurance Co. ("Atlantic Mutual"), with regard to the 1998 New Year's Eve Fire. David Steinberg, a self-employed sewing machine repairman, testified that in January 1999 he assessed the damage to the machines at Goodmark Industries. Steinberg stated that he either merely applied a coat of oil to the machines or advised Schlesinger to do the same. For these services, Steinberg

faxed an estimate for $58,000 to the Defendant. After the first estimate, the Defendant or his brother called Steinberg and asked for a second estimate. The second estimate was for $85,860, even though Steinberg stated that he never did any work on the machines. In addition, the insurance claim that the Defendant submitted contained a fraudulent estimate from a company known as G.I.I. Engineering. This was a fictitious company created by the Defendant.

Atlantic Mutual hired Thomas J. Russo, a cause and origin expert, to investigate and ascertain the origin and cause of the 1998 New Year's Eve Fire. Russo determined that the fire began in the shipping area on the third floor and that the entire building was secured when the fire department arrived. In order to assist his investigation, Russo hired James Pryor, an electrical engineer, to review the electrical system in the area of origin. The electrical engineer testified that he determined that there were no electrical faults which could have caused the fire. Pryor testified that he inspected the circuit breaker panel which provided service to the area of the fire, as well as the wiring and lighting in the area of the fire. Pryor ruled out electrical causes for this fire. Russo's on site inspection also revealed that there were no appliances, candles, machinery, chemicals, smoking material, or heating units in the area of origin.

Russo also conducted witness interviews of Abraham Weiser and Jack Schlesinger. Weiser told him that he personally did not smoke and he did not observe anyone smoking on the third floor

on December 31, 1998. He stated there were no candles, incense, oily rags, or cleaning agents in the area. Weiser stated that he did not notice anything unusual prior to departing and securing the area.

Jack Schlesinger told Russo that a delivery man may have been on the third floor around 11:00 a.m. on December 31, 1998. He also stated that he, the Defendant, and one other person were the only people with keys to the entire building.

As a result of his investigation, Russo concluded that the fire was intentionally set. Russo arrived at this conclusion by excluding all electrical and accidental causes. He was able to exclude cigarette smoking as a possible source of ignition for the following reasons: (1) there was no evidence that personnel smoked on the third floor; (2) there was no evidence of cigarettes on the third floor; and (3) the time between the last person exiting the building and the report of the fire was too long to support the inference that a kindling cigarette could have started the fire. Tr. 709. Russo also excluded an act of God after research indicated that there were no earthquakes or thunderstorms. Russo further excluded the possibility that the roof mounted heater caused the fire upon examination of the unit, which showed no evidence of flame impingement or any other heat source coming from the unit. After excluding all accidental causes, Russo concluded that the December 31, 1998 fire was intentionally set.

New York City Fire Marshal Bernard Santangelo testified that in March 1999 he opened an investigation into the 1998 New Year's Eve Fire. After commencing the investigation he attempted to interview the Defendant. Fire Marshal Santangelo stated that the Defendant repeatedly changed the date of the interview and delayed his appointment on several occasions. When the Defendant finally met with Fire Marshal Santangelo, the Defendant tape recorded the meeting without Fire Marshal Santangelo's knowledge. In the interview, Schlesinger told Fire Marshal Santangelo that he was the "Manager of financial operations" and held no official position in the company or on the board of directors. The Defendant also refused to answer several questions and seemed irritated. The Defendant responded to several questions by asking questions back such as "who are you?" The Defendant told Fire Marshal Santangelo that he had a complete set of keys to the building and left the building around 6 or 7 p.m. the night of the fire. When asked about the claim history of the building, the Defendant stated that he could only recall one other fire which occurred in 1991 when the factory was operating as Private Brands. The Defendant denied any involvement in Private Brands.

Fire Marshal Santangelo's investigation also considered the fraudulent estimate of repair drafted by the fictitious company G.I.I. Engineering. He also included the Russo report and the report from James Pryor the electrical expert. Fire Marshal Santangelo interviewed the firefighters

that responded to the scene as well as witnesses who were at the Defendant's building, including Abraham Weiser, Victor Schlesinger, and Israel Schwimmer.

Fire Marshal Santangelo also testified that on August 3, 1999, another fire broke out at the building. This fire was also later determined to be an arson because it had four distinct and separate points of origin.

Based upon all the interviews, reports, photographs, and his investigation, Fire Marshal Santangelo also concluded that the 1998 New Year's Eve Fire was an incendiary fire ignited by the intentional application of an open flame. Fire Marshal Santangelo also concluded that the only persons who had keys to the entire building on that night were Jack and Nat Schlesinger and that the buildings were secure upon arrival of the fire department. Retired New York City Fire Department Lieutenant Peter Casey testified that upon their arrival all doors to the building were locked, and that with great difficulty they forced open the doors.

The Defendant presented evidence of a bitter family dispute between him and the survivors of his brother Jack, who passed away in 2001, including Jack's son Victor Schlesinger. The Defendant recalled Abraham Weiser to the stand to refute the allegations made by Victor Schlesinger and Israel Schwimmer. Weiser testified that Nat Schlesinger never told him not to lock the third floor the night of the fire, in fact, he did not even speak to him before he left. In addition, he stated that Victor Schlesinger

had an office in the building at one point in time but in December 1998 that office had been converted into another office. Weiser also testified that the guard that Victor stated had let him in at night when the factory was locked had died in 1995 and that no replacement was ever hired. Weiser also stated that in addition to finished garments there were many old religious books that the Defendant had stored on the third floor. Further, he stated that he approached some of the witnesses that testified at the trial about lying on the stand and "they just say they want to fix Nat." Tr. at 2451, 2458.

After three days of deliberation, the jury returned a verdict of guilty on thirty of thirty-one counts, including both arson-related counts. After the trial, the Defendant moved pursuant to Fed. R.Crim. Proc. 29 for a judgment of acquittal arguing that the verdict was based upon mere speculation and surmise. The Defendant further moved to strike, as inadmissible hearsay, the testimony of Victor Schlesinger as to the statement "job well done" made by David Schlesinger in the days following the fire. The Defendant also contends that notwithstanding the admissibility of that statement, there was no proof that the Defendant aided, abetted, or participated in setting the 1998 New Year's Eve Fire.

II. DISCUSSION

A. The Standard of Review

The standard of review on a motion for judgment of acquittal is well-settled. In the Second Circuit it has been repeatedly stated that a defendant challenging a conviction on the basis of insufficient evidence bears a heavy burden. *United States v. Thomas,* 377 F.3d 232, 237 (2d Cir. 2004); *United States v. Tocco,* 135 F.3d 116, 123 (2d Cir. 1998); *United States v. Russo,* 74 F.3d 1383, 1395 (2d Cir. 1996). This is because the evidence must be viewed in the light most favorable to the government and all permissible inferences must be drawn in its favor. *See United States v. Hernandez,* 85 F.3d 1023, 1030 (2d Cir. 1996); *see also United States v. Casamento,* 887 F.2d 1141, 1156 (2d Cir. 1989). The court also must defer to the jury's resolution of witness credibility and, where there is conflicting testimony, to its selection between competing inferences. *Tocco,* 135 F.3d at 123; *see also United States v. Pelaes,* 790 F.2d 254, 259 (2d Cir. 1986). A conviction must be sustained if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Desimone,* 119 F.3d 217, 223 (2d Cir. 1997). Further, the elements of the crimes charged may be proved entirely by circumstantial evidence. *See United States v. Sureff,* 15 F.3d 225, 228 (2d Cir. 1994). Also, the court must consider the evidence in its totality, and not in isolation. *United States v. Rosenthal,* 9 F.3d 1016, 1024 (2d Cir. 1993).

"The court must be careful to avoid usurping the role of the jury." *United States v. Guadagna,* 183 F.3d 122, 129 (2d Cir. 1999). "If the court concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." *United States v. Autuori,* 212 F.3d 105, 114 (2d Cir. 2000). With these principles in mind, the Court must uphold the jury's verdict if it finds that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

B. The Evidentiary Issue

The Defendant argues that the statement "job well done" made by the Defendant's son after observing the fire for the first time is inadmissible hearsay. "Hearsay is evidence of a declarant's out-of-court statement to prove the truth of what is asserted in the statement." *United States v. Forrester,* 60 F.3d 52, 59 (2d Cir. 1995) (quoting *United States v. Reyes,* 18 F.3d 65, 69 (2d Cir. 1994)); Fed R. Evid. 801(c). As a general rule, hearsay is inadmissible unless an exception applies. Thus, the threshold question in this case is whether the statement at issue is hearsay, and if so, whether an exception applies.

A statement is not hearsay, under Fed.R.Evid. 801(d)(2)(E), if "[t]he statement is offered against a party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." *Id.*" In order to admit out-of-court statements pursuant to Rule 801(d)(2)(E), the trial court must find that the government has

established by a preponderance of the evidence that there was a conspiracy, that both the declarant and the party against whom the statements are offered were members of the conspiracy, and that the statements were made in furtherance of the conspiracy." *United States v. Daly,* 842 F.2d 1380, 1386 (2d Cir. 1988); *see also United States v. Alameh,* 341 F.3d 167, 176 (2d Cir. 2003); *United States v. Maldonado-Rivera,* 922 F.2d 934, 958 (2d Cir. 1990). In making this determination, the court may take into account the proffered out-of-court statement if that statement is sufficiently reliable in light of the evidence. *Bourjaily v. United States,* 483 U.S. 171, 107 S.Ct. 2775, 2781-82, 97 L.Ed.2d 144 (1987).

In 1997, following the Supreme Court's decision in *Bourjaily* concerning co-conspirator statements, Fed. R. Evid 801(d)(2)(E) was amended to clarify whether the declarant's statement alone can be sufficient to establish a conspiracy between the declarant and the defendant. The rule as amended states that "[t]he contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority ... or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered...." Fed.R.Evid. 801(D)(2). The advisory committee noted that a court must consider the circumstances surrounding the statement, in addition to the proffered statement, when making its evidentiary determination. The circumstances may include factors "such as the identity of the speaker, the context in which the statement was made, or

evidence corroborating the contents of the statement." Fed.R.Evid. R 801 advisory committee's note (1997 Amendment) (citing *Daly*, 842 F.2d at 1386).

The clarification in the amendment is clearly set forth in the authoritative text, Weissenberger's Federal Evidence:

> Under the amended Rule, a court can consider the contents of a conspirator's statement in making the preliminary determination as to whether a conspiracy exists between the declarant and the party against whom the statement is offered. This amendment thus reflects the holding of the Supreme Court in *Bourjaily*. However, the amendment also clarifies [that] the statement "are not alone sufficient" to establish the conspiracy. The trial court should consider circumstances surrounding the statement, such as the identity of the speaker and evidence corroborating the contents of the statement, in addition to the contents of the statement itself, in determining whether the proponent has proven the existence of a conspiracy by a preponderance of the evidence, as required under Rule 104(a).

Glen Weissenberger & James J. Duane, Weissenberger's Federal Evidence § 801.21 (4th ed. 2001).

With these principles in mind, in order to admit the statement "job well done," the Court must find by a preponderance of the evidence: (1) that a conspiracy existed that included the defendant

and the declarant; (2) that the statement was made during the course of and in furtherance of that conspiracy; and (3) that there is some independent corroborating evidence of the defendant's participation in the conspiracy. *United States v. Desena,* 260 F.3d 150, 157-58 (2d Cir. 2001). "The conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment." *United States v. Gigante,* 166 F.3d 75, 82 (2d Cir. 1999).

For a statement to be "in furtherance of the conspiracy," it must be more than a mere "narrative description by one co-conspirator of the acts of another." *United States v. SKW Metals & Alloys, Inc.,* 195 F.3d 83, 88 (2d Cir. 1999) (citations and quotation marks omitted). "Statements in furtherance of a conspiracy 'prompt the listener ... to respond in a way that promotes or facilitates the carrying out of a criminal activity.'" *Desena,* 260 F.3d at 157-58 (quoting *Maldonado-Rivera,* 922 F.2d at 958). "[T]he statements need not be commands, but are admissible if they 'provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or *inform each other as to the progress or status of the conspiracy.*'" *SKW Metals & Alloys, Inc.,* 195 F.3d at 88 (quoting *Maldonado-Rivera,* 922 F.2d at 959) (emphasis added).

Here, the Court finds that a conspiracy to commit arson and submit a fraudulent insurance claim existed between the Defendant and his son David Schlesinger by a preponderance of the evidence. The statement "job well done" was made by a close

family member — the Defendant's son David Schlesinger — shortly after observing the damage the factory sustained after the fire. Israel Schwimmer corroborated the utterance of the statement and testified that the Defendant responded by saying "[w]e will wait for the claim that is going to go through." Although Schwimmer testified that the statement was made "a week after the fire," the statement and location where it was overheard are identical to the testimony of Victor Schlesinger so as to find it corroborating. In addition, the statement appears to have been made in furtherance of the conspiracy in that it "inform[ed] [the Defendant] as to the progress or status of the conspiracy." *SKW Metals & Alloys, Inc.*, 195 F.3d at 88. His evident happiness standing in a place of destruction after the fire is revealing, apparently declaring the successful culmination of the subject of the conspiracy. As such, the Court finds, by a preponderance of the evidence, that the statement "job well done" along with the circumstances in which it was made satisfy the requirements to be admitted into evidence under Rule 801(d)(2)(E).

In addition, the Court finds that the statement "job well done" was admissible under Fed.R.Evid. 803(1) as a present sense impression exception to the hearsay rule. According to the Rule, a present sense impression is a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Fed.R.Evid. 803(1). "Rule 803(1) provides a vehicle for the admission of out-of-court statements concerning an event or condition where the statement describes or explains

the event." Weissenberger's Federal Evidence § 803.1. In this case, clearly the words "job well done" both described and explained — in a happy vein — the destruction caused by the fire. "Such statements are considered to be trustworthy because the [contemporaneous report] of the event and its description limits the possibility for intentional deception or failure of memory." *United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002) (citing *United States v. Brewer*, 36 F.3d 266, 272 (2d Cir. 1994)); *see, e.g., United States v. Dolan*, 120 F.3d 856, 869 (8th Cir. 1997) (upholding the admission of a statement under the present sense impression in which the declarant stated that he "had [the defendant] by the balls" shortly after having met with the Defendant).

Here, the Government has established the following facts by a preponderance of the evidence: (1) that David Schlesinger observed firsthand the condition of the factory as he made his way to the second floor, (2) that the statement was made immediately after he observed the condition of the factory, (3) that the statement described what he observed firsthand through his senses, and (4) that he was also describing the successful culmination of the subject of the conspiracy. *See, e.g., Brown v. Keane*, 355 F.3d 82, 89 (2d Cir. 2004). As such the statement is admissible under the present sense impression exception to the hearsay rule.

C. The Arson Conviction

In this case, Schlesinger was convicted of one count of arson under 18 U.S.C. § 844(i) and one count of use of fire to commit a felony under 18 U.S.C. § 844(h)(1). Arson is prohibited under the terms of 18 U.S.C. § 844(i), which states in pertinent part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

18 U.S.C.A. § 844.

Congress originally enacted 18 U.S.C. § 844(i) as part of Title XI of the Organized Crime Control Act of 1970, Pub.L. 91-452, § 1102, 84 Stat. 952, "because of the need to curb the use, transportation, and possession of explosives." *Russell v. United States,* 471 U.S. 858, 860, n. 5, 105 S.Ct. 2455, 85 L.Ed.2d 829 (1985) (citation omitted). The word "fire," which was not originally included in § 844(i), was introduced by statutory amendment in 1982. *See Jones v. United States,* 529 U.S. 848, 852-53, 120 S.Ct. 1904, 1909, 146 L.Ed.2d 902 (2000). In its current form, § 844(i) provides for the punishment of anyone who attempts to damage or destroy any building used in interstate commerce by means of fire. *United States v. Joyner,* 201 F.3d 61, 78 (2d Cir. 2000).

To maintain a prosecution under 18 U.S.C. § 844(i), the government must prove that the defendant: (1) maliciously; (2) damages or destroys, or attempts to damage or destroy a building; (3) by means of fire or explosive; and (4) the building is used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. *See United States v. Gullett,* 75 F.3d 941, 947 (4th Cir. 1996); *United States v. Nguyen,* 28 F.3d 477, 480-81 (5th Cir. 1994); *United States v. Triplett,* 922 F.2d 1174, 1177 (5th Cir. 1991).

The element of "malice," "is satisfied if the defendant acted intentionally or with willful disregard of the likelihood that damage or injury would result from his or her acts." *Gullett,* 75 F.3d at 948. In addition, the government must show that the arson in question destroyed or damaged property either 'used in' or 'used in any activity affecting' interstate commerce. *Joyner,* 201 F.3d 61, 78 (quoting *Tocco,* 135 F.3d at 124).

Under the provisions of 18 U.S.C. § 844(h)(1), a person who uses fire or explosives to commit a felony, such as mail or wire fraud, is subject to an additional mandatory, and consecutive, sentence of five to fifteen years. *Id.; United States v. Marji,* 158 F.3d 60, 64 (2d Cir. 1998). To sustain a conviction under § 844(h)(1), the government must prove that the defendant (1) used fire (2) to commit a "felony which may be prosecuted in a court of the United States." 18 U.S.C. § 844(h)(1). In order to find the evidence sufficient for a conviction under section 844(h)(1), the underlying felony as well as the arson must be analyzed for sufficiency. However, since this motion attacks only the arson

and not the other convictions, the only question the Court faces at this juncture is whether the evidence is sufficient to establish that Schlesinger committed or aided and abetted the commission of arson under § 844(i). *See, e.g., Nguyen,* 28 F.3d at 481. Accordingly, the § 844(h)(1) conviction for use of fire to commit a felony will stand or fall with the arson count.

In *United States v. Yoakam,* 116 F.3d 1346, 1350 (10th Cir. 1997), the United States Court of Appeals for the Tenth Circuit reversed a conviction for arson on the basis of insufficient evidence. In that case the government sought to prosecute the twenty-five percent shareholder of a supply company after the business was suspiciously burned to the ground. The fire broke out on the same night that the defendant was to finalize an agreement to purchase the remainder of the company from the other shareholders. The defendant was the last person to leave the business that night. Three fire experts testified that the cause of the fire was arson. However, the court found that there was insufficient evidence linking the arson to the defendant. In particular, the court noted that there was no evidence to support the government's theory that the defendant was motivated to commit arson by pressure to enter into an unfavorable business arrangement. *Id.* The only evidence that the court found that linked the defendant to the fire was that he was the last person to leave the building before the fire broke out. The court held, "In our view, mere presence cannot establish beyond a reasonable doubt that [the defendant] committed the arson." *Id.*

In this case the cumulative circumstantial evidence the Government presented at trial was sufficient for a reasonable juror to conclude, beyond a reasonable doubt, that the Defendant Schlesinger committed both arson and use of fire to commit a felony. Unlike the *Yoakam* case, here there is more evidence than mere presence. Despite the lack of direct evidence, the Court finds that the totality of the circumstantial evidence is sufficient to sustain the verdict. Crimes may be proven entirely by circumstantial evidence, so long as the jury could fairly have found beyond a reasonable doubt that the defendant engaged in the charged criminal conduct. *See United States v. Sureff,* 15 F.3d 225, 228 (2d Cir. 1994) (observing that a prosecution for murder may succeed without a body or other evidence of the means of death). Here, the circumstantial evidence the Government offered tended to show that Schlesinger had the motive, means, and opportunity to commit the crime, as well as consciousness of guilt.

There was ample evidence that the fire was intentionally set. The Government presented both the cause and origin expert and the New York City Fire Marshal that investigated the fire. Both investigators concluded after separate independent investigations that the fire was intentionally set and that the building was locked tight when the firefighters arrived. The time, location, and the absence of accidental or natural sources of ignition for the fire provided ample evidence that it was incendiary, even though there was no direct evidence that an accelerant was used to ignite the fire.

There was also testimony sufficient to permit a reasonable juror to infer that the Defendant had prior knowledge of the contemplated arson. Israel Schwimmer observed the Defendant and his son removing four or five bags of papers from the Defendant's files in the second floor office the day of or the day prior to the fire. In addition, Schwimmer testified that the Defendant told Abraham Weiser not to lock the third floor that night. Further, Victor Schlesinger testified that he was instructed by the Defendant not to return to the building that night.

The evidence showed that the Defendant had an opportunity and a means to commit the crime. The Defendant was the last person to leave the factory that night. After a thorough investigation, Fire Marshal Santangelo concluded that the Defendant and his brother Jack were the only two individuals who had access to the outside entrances and the third floor. Undisputed testimony from Fire Marshal Santangelo and the firefighters at the fire scene established that all of the outside entrances as well as the entrance to the third floor shipping area were locked upon arrival of the first fire companies. There was no evidence that a perpetrator broke into the factory or could have gained entry through the locked doors. Based on this evidence, a reasonable juror could conclude, beyond a reasonable doubt, that the Defendant was one of only two people who had the access to start the fire in the third floor of the tightly locked factory.

Also, there was evidence adduced that the Defendant had a motive to commit the crime. After the fire the Defendant told his son Sam Schlesinger to put together a "nice claim" that included all the old and new fabric. The fire had been confined to the third floor where there was no valuable machinery to damage. The Defendant submitted two fraudulent estimates in the insurance claim made to Atlantic Mutual with regard to machines that were never damaged. In addition, the Defendant told his brother Jack to take it slow in restarting the business because insurance adjusters needed to come and evaluate the damage. All of this evidence demonstrates a motive to commit arson and to steal money from the insurance company.

Testimony from both Israel Schwimmer and Victor Schlesinger showed that the Defendant impliedly acknowledged the criminal act and substantiated the motive for the arson. On the first day that the Defendant and his employees were able to return to the factory, two witnesses overheard the Defendants son David exclaim "job well done." Schwimmer testified that the Defendant replied, "[w]e will wait for the claim that is going to go through." This exchange was described as joyful and occurred shortly after the fire and while the declarants were under an area of extensive damage. A reasonable juror could conclude from these statements, beyond a reasonable doubt, that the Defendant had knowledge and involvement in aiding and abetting or causing the fire.

Finally, there was evidence that the Defendant conducted himself in such a manner after the fire so that a reasonable juror could infer a consciousness of guilt. The Second Circuit has held that a jury may infer consciousness of guilt from, for example, evidence of flight after a crime. *See United States v. Salameh,* 152 F.3d 88, 157 (2d Cir. 1998); *United States v. Sanchez,* 790 F.2d 245, 252 (2d Cir. 1986). Although flight has been described as the "consummate act of evasion," nervous or evasive behavior is also relevant suspicious conduct from which a juror could draw a reasonable inference of consciousness of guilt. *See Illinois v. Wardlow,* 528 U.S. 119, 124-25, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (discussing flight in the context of reasonable suspicion); *Pinkney v. Keane,* 737 F.Supp. 187, 197-98 (E.D.N.Y. 1990) (finding that evasive responses to police questions after the crime demonstrated consciousness of guilt).

Here, although it may not rise to the level of consciousness of guilt that flight represents, the jury had the right to consider evidence that Schlesinger acted in a suspicious manner when questioned about the fire by Fire Marshal Santangelo. After repeatedly delaying his interview with Fire Marshal Santangelo, the Defendant surreptitiously tape recorded the interview. His responses were described as evasive and accusatory. The Defendant denied involvement in Private Brands and stated that he only recalled one other fire in the building in 1991. Moreover, his description of his involvement in Goodmark Industries as a "Manager of Financial Operations" was misleading. In fact, the evidence showed that the Defendant and his brother owned and

controlled every aspect of Goodmark Industries and Private Brands, and that there were three previous fires in the factory. The jury was entitled to infer consciousness of guilt from the facts surrounding the surreptitious recording, the evasive behavior, and the misleading statements.

The Defendant attempted to discredit the witnesses and present alternative explanations. However, the jury was entitled to credit the testimony of the Government's witnesses and experts. The Court "must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." *United States v. Daly*, 842 F.2d 1380, 1389 (2d Cir. 1988) (internal quotation marks omitted).

In sum, all of the evidence presented was more than sufficient, when taken together, to establish, beyond a reasonable doubt, that Schlesinger either participated in or aided and abetted in the arson involving the 1998 New Year's Eve Fire in his building in order to submit a fraudulent insurance claim.

CONCLUSION

Having reviewed the submissions of the parties, it is hereby

ORDERED, that the Defendants' motion pursuant to Rule 29(c)(2) for a judgment of acquittal as to counts twenty and twenty-one is DENIED.

SO ORDERED

Dated: Central Islip, New York
June 8, 2005

/s/ Arthur D. Spatt

ARTHUR D. SPATT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

NAT SCHLESINGER, also known as "Naftule Schlesinger" and "Zvi Pollack," HERMAN NIEDERMAN, and GOODMARK INDUSTRIES, INC.,

Defendants.

Cr. No. 02-485 (ADS)(ARL)
Oct. 7, 2005

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MEMORANDUM OF DECISION AND ORDER

SPATT, *District Judge*.

The Defendant Nat Schlesinger ("Schlesinger" or the "Defendant") moves this Court pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial on his conviction of arson and use of fire to commit felonies charged in Counts Twenty and Twenty-One of the superseding indictment (collectively, the "arson counts"). The Defendant argues that there was neither competent, satisfactory, or sufficient evidence adduced at the trial to support the jury's determination that Schlesinger was guilty of the arson counts beyond a reasonable doubt. Specifically, the Defendant argues that the only evidence linking him to the arson counts was adduced through the testimony of Victor Schlesinger and Israel Schwimmer, whose testimony, he contends, was patently incredible and hearsay.

Rule 33 states that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed.R.Crim.P. 33. As stated by the Second Circuit in *United States v. Ferguson*, 246 F.3d 129, 133, 134 (2d Cir. 2001), the Rule 33 standard is as follows:

> The rule by its terms gives the trial court "broad discretion to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992). The district court must strike a balance between weighing the evidence and credibility of witnesses and not "wholly usurping" the role of the jury.

> [*United States v.*] *Autuori*, 212 F.3d 105, 120 [(2d Cir. 2000)]. Because the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, "[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." *Sanchez*, 969 F.2d at 1414. An example of exceptional circumstances is where testimony is "patently incredible or defies physical realities," although the district court's rejection of trial testimony by itself does not automatically permit Rule 33 relief.
>
> The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. *See Sanchez*, 969 F.2d at 1414. The trial court must be satisfied that "competent, satisfactory and sufficient evidence" in the record supports the jury verdict. *Id.* ... The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. *See id.* "There must be a real concern that an innocent person may have been convicted." *Id.* Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority "sparingly" and in "the most extraordinary circumstances." *Sanchez*, 969 F.2d at 1414.

Ferguson, 246 F.3d at 133-34.

Indeed, this standard has been described as a "heavy burden," *United States v. Fearon-Hales,* No 04-231, 2005 WL 2385845, at *1, 2005 U.S. Dist. LEXIS 21619, *3 (S.D.N.Y. Sept. 27, 2005), and "[i]t is well-settled that motions for new trials are not favored and should be granted only with great caution." *United States v. Costello,* 255 F.2d 876, 879 (2d Cir. 1958). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *Ferguson,* 246 F.3d at 134.

In this case, notwithstanding the defendant's assertion that the testimony of the witnesses was incredible, their testimony cannot be considered incredible as a matter of law. The Court finds no miscarriage of justice involving the testimony of either Victor Schlesinger or Israel Schwimmer. This is not a case where "the jury must have engaged in false surmise and rank speculation ..." to find Schlesinger guilty. *United States v. Wiley,* 846 F.2d 150, 155 (2d Cir. 1988). On the contrary, as detailed in the Court's Memorandum of Decision and Order of June 8, 2005, which denied the defendant's Rule 29 motion, the cumulative circumstantial evidence linking Schlesinger to the arson was sufficient for a reasonable juror to conclude, beyond a reasonable doubt, that Schlesinger committed both arson and use of fire to commit a felony. *See, e.g., Fearon-Hales,* 2005 WL 2385845 at 3, 2005 U.S. Dist. LEXIS 21619, at *7-8 ("Circumstantial evidence is equally as valuable as direct evidence, and it is the law that 'the jury's verdict may be based entirely on circumstantial evidence.'") (quoting *United States v. Martinez,* 54 F.3d 1040, 1043 (2d Cir. 1995)).

One of the case relied upon by the defendant, *United States v. Sanchez,* 969 F.2d 1409 (2d Cir. 1992), does not support the defendant's position. In Sanchez the district judge set aside a guilty verdict and ordered a new trial based on his determination that perjured testimony was given by three police officers. However, the Second Circuit reversed and reinstated the jury verdict. The Court reiterated the Rule:

> It long has been our rule that trial courts "must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." *United States v. LeRoy,* 687 F.2d 610, 616 (2d Cir. 1982), *cert. denied,* 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983). It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment. *See United States v. Kuzniar,* 881 F.2d 466, 470 (7th Cir. 1989). Where testimony is patently incredible or defies physical realities, it may be rejected by the court, despite the jury's evaluation. *See e.g., Holland v. Allied Structural Steel Co.,* 539 F.2d 476, 483 (5th Cir. 1976), *cert. denied,* 429 U.S. 1105, 97 S.Ct. 1136, 51 L.Ed.2d 557 (1977); *Zollman v. Symington Wayne Corp.,* 438 F.2d 28, 31-32 (7th Cir.), *cert. denied,* 404 U.S. 827, 92 S.Ct. 59, 30 L.Ed.2d 55 (1971).

Sanchez, 969 F.2d at 1414.

Reviewing the evidence as a whole, the Court finds that the testimony of Victor Schlesinger and Israel Schwimmer was not patently incredible nor does it defy physical realities. There is no "manifest injustice" with regard to the convictions in this case. Accordingly, the defendant's Rule 33 motion is denied.

SO ORDERED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

NAT SCHLESINGER, also known as "Naftule Schlesinger" and "Zvi Pollack," HERMAN NIEDERMAN, and GOODMARK INDUSTRIES, INC.,

Defendants.

MEMORANDUM OF DECISION AND ORDER
Cr. No. 02-485(ADS)(ARL)

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SPATT, District Judge.

In this motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure ("Fed. R.Crim.P.") the defendant Nat Schlesinger ("the defendant") seeks a new trial on his conviction following a trial by a jury, of thirty various counts of arson, conspiracy, insurance fraud, creditor fraud, and money laundering, on the basis of newly discovered evidence. The motion calls into question the veracity of two witnesses, primarily with the use of a surreptitiously recorded witness recantation. In addition, the defendant also alleges that the government not only withheld information useful for impeachment, but knowingly permitted false testimony concerning such information. Although the testimony at issue, and all of the alleged newly discovered evidence, relate only to the arson counts,

the defendant seeks dismissal of the entire conviction on the theories of prosecutorial misconduct and prejudicial spillover. The Court begins with a table of contents.

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I. BACKGROUND

A. The Indictment

On October 1, 2003, a grand jury entered a 34 count Superseding Indictment ("Indictment") against defendants Nat Schlesinger, Herman Niederman, and Goodmark Industries, Inc., charging arson, conspiracy, insurance fraud, creditor fraud, and money laundering, arising out of, among other acts, a series of five fires dating back to 1987 that occurred at a clothing factory in the Williamsburg section of Brooklyn. The Indictment alleged that Nat Schlesinger owned and maintained the factory with his brother, Jack Schlesinger, in a building that had various addresses due to the fact that the building occupied an entire city block and had multiple entrances.

The Indictment alleged that Nat Schlesinger and his brother masked their ownership of the numerous clothing manufacturing companies that occupied this location from the time they purchased the building in the early 1980's in order to conceal certain fraudulent schemes. One scheme involved defrauding insurance companies by submitting fraudulent claims for losses resulting from a series of five separate fires that occurred at the Premises from 1987 to 1999. The second scheme involved using various companies as vehicles to defraud creditors.

The Indictment also charged Nat Schlesinger with one count of arson and one count of use of fire to commit a felony in connection with the fire that occurred at the factory on December 31, 1998. The indictment charged that Nat Schlesinger

deliberately caused a fire in the factory on the night of December 31, 1998 for the purpose of submitting a false and inflated insurance claim totaling approximately $4,590,000.

B. The Trial

On April 11, 2005, a jury trial was commenced on the charges in the indictment.

1. The Fraudulent Schemes

At the trial the government offered overwhelming evidence of the two fraudulent schemes alleged in the indictment. In connection with the scheme to fraudulently inflate insurance claims on the five fires that occurred at the factory, through witnesses and numerous documents, the government showed that the defendant, through his various clothing businesses, unlawfully obtained money in the sum of $4,510,629.41 from insurance companies by bribing employees and adjusters, and submitting false documentation in support of fraudulent insurance claims. This amount was received by the defendant's businesses from insurance companies in payment of fraudulently inflated claims for the fires that occurred at the clothing factory. In addition, the government also established that this same sum of $4,510,629.41 in fraudulent insurance payments was laundered when it was deposited into and transferred through the various business accounts of the defendant and his businesses.

The government also submitted ample evidence proving the second complex creditor fraud scheme. This scheme involved the use of the defendant's companies Pous Apparel, Inc., Private Brands, Inc., and Goodmark Industries, Inc., as vehicles to defraud various creditors by masking the true ownership of the companies. This was accomplished by the use of nominees and shell corporations, and ultimately succeeded in carrying out what was, in effect, two self organized bankruptcies. Specifically, one of the fraudulent acts that the government proved at the trial was that Nat Schlesinger foreclosed on Goodmark Industries' machinery and equipment by using a company he controlled known as Western Industries, Inc., leaving the creditors of Goodmark without any recourse against Goodmark's assets. The evidence also showed that Nat Schlesinger masked his ownership of Western Industries through a series of nominees and transactions with shell corporations. After foreclosing on the Goodmark assets, Western Industries then sold the equipment at auction for the sum of $72,525.

2. The Arson

In comparison to the overwhelming direct evidence offered with regard to the two fraudulent schemes, the government's case on the arson counts consisted of circumstantial evidence. The government called several witnesses to testify about the fire including: (1) firefighters who were at the scene; (2) a cause and origin expert; (3) an electrical engineer who examined the wiring at the fire scene; (4) a sewing machine repairman; (5) the New York City Fire Marshal who investigated the fire; (6) the manager

of the third floor of the factory where the fire occurred; and (7) two employees who were at the factory and overheard conversations that the defendant had before and after the fire. These last two witnesses are the subject of the defendant's current motion for a new trial.

i. Testimony of the Firefighters

Peter Casey, a retired New York City Fire captain, and Kevin Williams, a retired New York City Fire lieutenant, both testified that on December 31, 1998, they were assigned to Ladder Company 104 in the Williamsburg section of Brooklyn. While on duty that night, at about 10:30 p.m., the New York City Fire Department received reports of a fire at the clothing factory in Williamsburg. Several fire companies, including Ladder 104, were dispatched and confirmed that there was visible fire coming from the third floor of the factory. All of the entrances to the factory were locked and secure when the fire department arrived. The firefighters forced entry into the factory and ascended the stairs to the third floor. At the top of the stairs they found that the entrance to the third floor was also locked and they had to break down that door. Inside the third floor there was a smokey fire that was difficult to find. One of the firefighters became lost while searching for the fire and sent out a "mayday." The firefighter was quickly rescued and was unharmed.

The fire was eventually found to be located underneath a mezzanine that was constructed above the third floor. Under the mezzanine, clothes were hung from rows of racks. Above the mezzanine boxed goods were stored. Firefighters testified

that in order to extinguish the fire they had to proceed through each of the rows of clothes under the mezzanine. Part of the mezzanine eventually collapsed due to the fire.

ii. Testimony of Thomas J. Russo and James Pryor

The primary investigation with regard to the December 31, 1998 fire was conducted by Thomas J. Russo of Russo Consultants, a cause and origin expert hired by Atlantic Mutual Insurance Co. ("Atlantic Mutual"). This company was retained to investigate and ascertain the origin and cause of the fire that occurred at the defendant's factory on December 31, 1998. Russo had 24 years of prior experience both as a New York City Firefighter and Fire Marshal. On January 7, 1999, Russo first went to the scene of the fire at the factory to investigate, at which time he conducted a physical inspection of the premises. Russo determined that the origin of the fire was in the shipping area on the third floor.

Russo then investigated the cause of the fire. The on site inspection revealed that there were no appliances, candles, machinery, chemicals, smoking material, or heating units in the area of origin. He also determined that the entire building was secured when the fire department arrived in that all of the locks on the entrances to the factory were forced open by the fire department, and by reviewing the reports of the fire department indicating the use of force to gain entry to the building.

In order to assist his investigation, Russo hired James Pryor, an electrical engineer, to review the electrical system in the area of origin. The electrical engineer testified that he determined that there were no electrical faults which could have caused the fire. Pryor testified that he inspected the circuit breaker panel which provided service to the area of the fire, as well as the wiring and lighting in the area of the fire. Pryor ruled out electrical causes for this fire.

Russo also conducted witness interviews of Abraham Weiser and Jack Schlesinger. Weiser told him that he personally did not smoke and he did not observe anyone smoking on the third floor on December 31, 1998. He stated there were no candles, incense, oily rags, or cleaning agents in the area. Weiser stated that he did not notice anything unusual prior to departing and securing the area. Jack Schlesinger told Russo that a delivery man may have been on the third floor around 11:00 a.m. on December 31, 1998. He also stated that he, his brother Nat Schlesinger, and one other person were the only people with keys to the entire building.

As a result of his investigation, Russo concluded that the fire was intentionally set. Russo arrived at this conclusion by excluding all electrical and accidental causes. He was able to exclude cigarette smoking as a possible source of ignition for the following reasons: (1) there was no evidence that personnel smoked on the third floor; (2) there was no evidence of cigarettes on the third floor; and (3) the time between the last person exiting the building and the report of the fire was too long to support the inference that a kindling cigarette could

have started the fire. Russo also excluded an act of God after research indicated that there were no earthquakes or thunderstorms. Russo further excluded the possibility that the roof mounted heater caused the fire upon examination of the unit, which showed no evidence of flame impingement or any other heat source coming from the unit. After excluding all accidental causes, Russo concluded that the December 31, 1998 fire was intentionally set.

iii. Testimony of David Steinberg

Testimony and other evidence was offered by the government to show that not only did Atlantic Mutual's investigation label the fire as intentionally set, but that the insurance claim the defendant submitted to Atlantic Mutual with regard to the 1998 fire was fraudulent. David Steinberg, a self-employed sewing machine repairman, testified under a grant of immunity that in January 1999 he assessed the damage to the machines at the factory. Steinberg stated that he either merely applied a coat of oil to the machines or advised Schlesinger to do the same. For these services, Steinberg faxed an estimate to the defendant for $58,000. After the first estimate, the defendant or his brother called Steinberg and asked for a second estimate. The second estimate was for $85,860. Steinberg then sent an invoice for $85,860 for the repair of the machines, even though he never did the work on the machines. Gov't Ex. 98-43. Steinberg testified that he lied to insurance company employees and claimed to have performed the work reflected on the invoice, even though he never did any work. Trial Tr. at 1225.

In addition, the insurance claim that the defendant submitted contained a fraudulent estimate from a company known as G.I.I. Engineering. This was a fictitious company created by the defendant for the purpose of submitting a fraudulent insurance claim.

iv. Testimony of Fire Marshal Bernard Santangelo

New York City Fire Marshal Bernard Santangelo testified that he opened an investigation regarding the fire in March 1999, approximately three months after it occurred. The New York City Fire Marshal was initially requested to investigate the suspicious fire the night of the fire, but was unable to respond until the following Monday due to the New Year's holiday. When the Fire Marshal responded, a quick investigation was conducted and it was determined that the cause of the fire was "not ascertained." Due to lack of resources, the investigator at the time was unable to search under the partially collapsed mezzanine, and thus labeled the location of the fire as the third floor, origin unknown. Fire Marshal Santangelo re-opened the investigation several months later when he was contacted by Charles Radtke from Russo Consultants with regard to the suspicious fire.

After commencing the investigation, Fire Marshal Santangelo requested documents from the insurance company regarding its investigation and he attempted to interview both Jack Schlesinger and Nat Schlesinger. He testified that the defendant repeatedly changed the date of the interview and delayed his appointment on several occasions. When the defendant finally met with Fire Marshal

Santangelo, the defendant tape recorded the meeting without Fire Marshal Santangelo's knowledge. In the interview, Nat Schlesinger told Fire Marshal Santangelo that he was the "Manager of financial operations" and held no official position in the company or on the board of directors. The defendant also refused to answer several questions and seemed irritated. Also, the defendant responded to several questions by asking questions such as "who are you?" The defendant told Fire Marshal Santangelo that he had a complete set of keys to the building and left the building around 6 or 7 p.m. the night of the fire. When asked about the claim history of the building, the defendant stated that he could only recall one other fire which occurred in 1991 when the factory was operating as Private Brands. The defendant also denied any involvement in Private Brands.

Fire Marshal Santangelo's investigation also considered the insurance claim submitted by Goodmark Industries. He determined that the defendant submitted a fraudulent estimate of repair to the machinery. The estimate was drafted by a company he later found to be fictitious named G.I.I. Engineering. In his report, he also included the Russo report and the report from James Pryor the electrical expert. Fire Marshal Santangelo interviewed the firefighters that responded to the scene as well as witnesses who were at the Defendant's building, including Abraham Weiser, Victor Schlesinger, and Israel Schwimmer.

Fire Marshal Santangelo also testified that on August 3, 1999, another fire broke out at the building. This fire was also later determined to be intentionally set because it had four distinct and separate points of origin.

Based upon all the interviews, reports, photographs, and his investigation, Fire Marshal Santangelo concluded that the 1998 fire was an arson and that it was ignited by the intentional application of an open flame. Fire Marshal Santangelo also concluded that the only persons who had keys to the entire building on that night were Jack and Nat Schlesinger and that the buildings were secure upon arrival of the fire department.

v. Testimony of Abraham Weiser

Abraham Weiser was called as a witness by the government. He had worked for the Defendant for approximately twelve years until the clothing business closed in 2000. At the time of the fire, Abraham Weiser was the supervisor of the shipping department located on the third floor. He was responsible for packing the manufactured garments in boxes to ship by UPS or in bags to be delivered by their own truck. Weiser testified that no other employees worked with him in the shipping area in December 1998. One of his responsibilities was to secure the two entrances to the third-floor shipping area and turn off the lights by closing the circuit breaker each night before he left. In fact, Abraham Weiser testified that it was his practice to secure both doors and turn off the circuit breaker at the end of the day

and that the only other people with keys to that floor were Jack and Nat Schlesinger. However, Abraham Weiser stated that he did not have keys to the exterior entrances of the factory.

Weiser testified that on December 31, 1998, he was the only person on the third floor during the day. He testified that he did not smoke; that smoking was not permitted in the building; and he did not observe anyone smoking on the third floor on the day of the fire. Weiser stated that he "wouldn't let them smoke" because he "can't take the smoke." Trial Tr. at 616. Weiser further testified that there were no flammable liquids, thinners, dyes, linseed oils or the smell of smoke or any other unusual odor before he left on December 31, 1998. Weiser stated that occasionally a small cleaning gun was used on the third floor to remove stains from the finished garments. Weiser testified that on December 31, 1998, at about 4:00 p.m., he locked up the third floor and turned off the circuit breaker providing electricity to the third floor, locked both doors, and left the building.

vi. Testimony of Victor Schlesinger

Victor Schlesinger, who is Jack Schlesinger's son, testified that at the time of the fire he had maintained an office in the factory on the second floor. Victor stated that he would typically visit the factory and his father Jack daily at the end of the day. He stated that he did not have keys to the factory but that the security guard would let him in. On the day of the fire, Victor went to his father's office and found his father with Nat. While in the office, Victor told his father that he

wanted to come back to the building later that evening to get some work done. The defendant overheard this request and told Victor, "No, you are not coming back here." Trial Tr. at 1490. Jack told Victor that he should listen to Nat and not return to the building. While this conversation was occurring, Victor observed Abraham Weiser enter the office and tell the Defendant and Jack that he was closing the third floor. Victor testified that the Defendant told Weiser, "No, don't close up the third floor, I'm going to close it." Trial Tr. at 1491.

Victor Schlesinger did not return to the factory until the Monday following the fire. He testified that he observed substantial damage in the building and described it as a "whole mess." Trial Tr. at 1493. When Victor went to see his father Jack in the second floor office that day, he found the defendant with him. The defendant was telling Jack Schlesinger to go slow in starting up the business because adjusters needed to come down and assess the damage. While they were in the office, the defendant's son David Schlesinger entered the room and stated "job well done." Trial Tr. at 1500. Victor testified that the statement was made with bravado as a "happy thing," despite the fact that he was standing in the midst of the damage resulting from the fire. The Court notes that the testimony was erroneously transcribed as "bragado [sic], happy things," instead of "bravado." Trial Tr. at 1500.

Counsel for the defendant rigorously cross examined Victor Schlesinger, often questioning his responses until, on occasion, he changed his testimony. For example, Victor Schlesinger first

testified that he did not have much of a relationship with the defendant and was not involved in any litigation with him. However, after several questions, Victor Schlesinger readily admitted that he had a "bitter relationship" with the defendant and they were involved in ongoing civil litigation. Victor Schlesinger also admitted that he contacted Atlantic Mutual and first told them about the insurance fraud scheme because he was angry and had his suspicions about the fire, and because Nat Schlesinger was transferring a lot of "things that my father supposedly had." Trial Tr. at 1512.

Victor Schlesinger was further questioned about the family dispute with Nat Schlesinger. He testified that Nat Schlesinger had cancelled Jack Schlesinger's medical insurance and forced Jack's daughter Miriam Schwimmer, who is also Israel Schwimmer's wife, out of the family residence, which made Jack Schlesinger's wife and the rest of her family very upset. Victor Schlesinger admitted that he and Miriam Schwimmer had a "bitter, bitter, bitter, family feud ..." beginning after Jack Schlesinger passed away and lasting up until the present with the defendant and his family. Trial Tr. at 1522.

Finally, counsel for the defendant questioned whether Victor Schlesinger "w [as] in business in Minnesota." Trial Tr. at 1513. Victor Schlesinger responded "Never." He was also asked about Gary Schlesinger and Michael Schlesinger, who he identified as being the same person, namely, his younger brother. Victor Schlesinger further stated that he was not aware of any legal problems facing Gary Schlesinger.

vii. Testimony of Israel Schwimmer

Israel Schwimmer, who is Jack Schlesinger's son-in-law, worked at Goodmark Industries for several years. The Court notes that Schwimmer's responses to all of the questions during both direct and cross examination in his trial testimony were generally short, and were often only one word answers. He testified that on the day of or a day prior to the December 31, 1998 fire he observed the defendant and his son David Schlesinger removing about four or five bags of papers from the defendant's file cabinets. Schwimmer testified that before he left on the day of the fire he stopped in to see Jack Schlesinger in the main office. While in the office he overheard a conversation between Abraham Weiser and the defendant. Weiser told the defendant that he was going to lock up the third floor for the day. The defendant told Weiser that he would take care of locking up the third floor that day. Israel Schwimmer testified that he left the building at about 5:00 pm that day and went to his home in Monroe, New York. Schwimmer noted that Jack and Nat Schlesinger remained at the factory in the second floor office.

Israel Schwimmer then testified with regard to the events that took place the Monday following the fire, which was the first day the owners were allowed back into the factory. Israel Schwimmer testified that he went to the main office where he saw the defendant with Jack Schlesinger, Milton Jacobi, Abraham Weiser, and the defendant's son, Sam Schlesinger. There, Schwimmer overheard a conversation between Nat Schlesinger and his son Sam Schlesinger, who was an insurance claims

adjuster. The defendant told him to "put together a nice claim" and to "put everything, new fabric, old fabric, whatever he could put in the claim." Trial Tr. at 508-09. Israel Schwimmer also testified that later he was outside the second floor office when David Schlesinger entered proclaiming "a job well done." Trial Tr. at 510. Schwimmer testified that the defendant replied to that statement by saying, "[w]e will wait for the claim that is going to go through." Trial Tr. at 510.

Schwimmer was also subjected to a thorough cross-examination by defense counsel. During cross examination Schwimmer reluctantly testified about the animosity that existed between Jack Schlesinger's family and Nat Schlesinger and his family. Schwimmer admitted to a violent altercation between him and the defendant's son, David Schlesinger, which resulted in Schwimmer's arrest, and also about the pending civil litigation between the two families.

viii. Additional Evidence of Arson

The government introduced documentation of the fraudulent insurance claim submitted at the direction of the defendant following the 1998 fire that was drafted by David Steinberg. This fraudulent claim also included an estimate from the defendant's fictitious company, G.I.I. Engineering. To show that the company was fictitious, the government introduced the defendant's statement given in an examination under oath to Atlantic Mutual, in which he admitted that he created G.I.I. Engineering. Finally, the government also

introduced evidence showing that the fire was confined to the third floor, where the clothing stock was stored, but where there was no valuable machinery to damage.

3. The Defense

The defendant presented evidence of a bitter family dispute between him and the family of his brother Jack, who passed away in 2001, including Jack's son Victor Schlesinger. The defendant recalled Abraham Weiser to the stand to refute the allegations made by Victor Schlesinger and Israel Schwimmer. Weiser testified that Nat Schlesinger never told him not to lock the third floor the night of the fire. In fact, he did not even speak to him before he left. In addition, he stated that Victor Schlesinger had an office in the building at one point in time but in December 1998 that office had been converted into another office. Weiser also testified that the guard that Victor stated had let him in at night when the factory was locked had died in 1995 and that no replacement was ever hired. Weiser also stated that in addition to finished garments there were many old religious books that the Defendant had stored on the third floor. Further, he stated that he approached some of the witnesses that testified at the trial about lying on the stand and "they just say they want to fix Nat." Trial Tr. at 2451, 2458.

A substantial portion of the defense's summation to the jury was spent attacking the credibility of Victor Schlesinger. Counsel described Victor Schlesinger as a person who "has every motivation in the world to fabricate and implicate his uncle who he hates to the core...." Counsel argued that

there was ample evidence to show that he tipped the insurance company due to the bitter dispute he and his family had with Nat Schlesinger, and further argued that he testified for the government for the same reason. Counsel urged the jury to believe that Victor Schlesinger lied to them for "[t]hree reasons: Revenge, hatred and greed ... he wants his uncle out of the way." Trial Tr. at 2701.

4. Verdict

On May 19, 2005, after a four week jury trial, and three days of deliberation, the jury returned a verdict of guilty on thirty of thirty-one counts. Nat Schlesinger was convicted of one count of arson and one count of use of fire to commit a felony in connection with the December 31, 1998 fire. In addition, Schlesinger was convicted of one count of conspiracy to commit mail and wire fraud with regard to insurance claims, thirteen counts of mail fraud, and two counts of wire fraud on the insurance claims, and one count of conspiracy to engage in monetary transactions with insurance fraud proceeds in connection with the scheme to fraudulently inflate insurance claims on the losses suffered as a result of the 1998 fire and four other fires that occurred at the factory. Nat Schlesinger was also convicted of one count of conspiracy, four counts of mail fraud, and three counts of engaging in monetary transactions with fraudulent proceeds resulting from a second scheme to defraud the creditors of the clothing manufacturing businesses that he controlled.

C. The Post Trial Motions

1. The Rule 29 Motion for a Judgment of Acquittal

After the trial, the defendant moved pursuant to Fed. R.Crim. Proc. 29 for a judgment of acquittal arguing that the verdict was based upon mere speculation and surmise. The defendant further moved to strike, as inadmissable hearsay, the testimony of Victor Schlesinger as to the statement "job well done" made by David Schlesinger in the days following the fire. The defendant also contended that notwithstanding the admissibility of that statement, there was no proof that the defendant aided, abetted, or participated in setting the 1998 fire.

On June 8, 2005, the Court denied the defendant's motion for a judgment of acquittal. *See United States v. Schlesinger,* 372 F.Supp.2d 711 (E.D.N.Y. 2005). As to the evidentiary issue, the Court found that the statement "job well done" along with the circumstances in which it was made satisfied the requirements to be admitted into evidence under Rule 801(d)(2)(E) of the Federal Rules of Evidence ("Fed.R.Evid."). In addition, the Court found that the statement "job well done" could also be admissible under Fed.R.Evid. 803(1) as a present sense impression exception to the hearsay rule. *Id.* at 721.

The Court also analyzed the sufficiency of the government's evidence supporting the arson conviction and the use of fire to commit a felony conviction and found that "the circumstantial evidence the Government offered tended to show

that Schlesinger had the motive, means, and opportunity to commit the crime, as well as consciousness of guilt." *Id.* at 723. Although the Court had initially commented at the trial that the evidence appeared weak, upon further review the Court found that the circumstantial indices of guilt were supported by ample evidence to show that the fire was intentionally set; that the defendant had a motive to set the blaze in order to recover insurance proceeds; and that he had the opportunity to commit the crime. The Court also noted that the jury had a right to consider the defendant's suspicious behavior after the fire in his interaction with Fire Marshal Santangelo as a display of consciousness of guilt. *Id.* at 724.

As to the two witnesses that are called into question in the instant motion for a new trial, the Court found that "[t]estimony from both Israel Schwimmer and Victor Schlesinger showed that the Defendant impliedly acknowledged the criminal act and substantiated the motive for the arson." *Id.* The statements they overheard about putting together a "nice claim" and to take it slow in restarting the business could be viewed as part of the circumstantial evidence in support of the arson verdict. In addition, they overheard the defendant's son David exclaim "job well done" and the defendant reply that, "[w]e will wait for the claim that is going to go through." These statements were part of the evidence that permitted the jury to find that the defendant had knowledge and involvement in aiding and abetting or causing the fire.

Ultimately, the Court concluded that "all of the evidence presented was more than sufficient, when taken together, to establish, beyond a reasonable doubt, that Schlesinger either participated in or aided and abetted in the arson involving the 1998 New Year's Eve Fire in his building in order to submit a fraudulent insurance claim." *Id.* at 724-25.

2. The First Rule 33 Motion for a New Trial

The Defendant then moved for a new trial under Fed.R.Crim.P. 33, advancing similar arguments. The defendant argued that the only evidence linking him to the arson counts was adduced through the testimony of Victor Schlesinger and Israel Schwimmer, whose testimony, he contended, was patently incredible and constituted inadmissible hearsay.

The Court denied that motion, ruling that the testimony of the two witnesses could not be considered incredible as a matter of law because it was not patently incredible nor did it defy physical realities. *United States v. Schlesinger*, 396 F.Supp.2d 267, 270-71 (E.D.N.Y. 2005).

3. The Second Rule 33 Motion for a New Trial

On, February 3, 2006, the defendant filed the instant motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The motion seeks a new trial on the basis of newly discovered evidence with regard to the arson counts of the indictment and dismissal of the

remaining counts of the indictment on the basis of prosecutorial misconduct that violated defendant's due process rights and other rights secured by the Constitution.

The defendant claims that the newly discovered evidence set forth in this latest motion shows that Israel Schwimmer and Victor Schlesinger committed perjury when they testified as to Nat Schlesinger's involvement in the 1998 fire. In addition, the defendant alleges that newly discovered evidence reveals that Schwimmer and Victor received promises of leniency from the government in return for their cooperation, and that this information was withheld from the defense. Further, the defendant claims that the government withheld information about the involvement of Victor Schlesinger in a business located in Minnesota that was under a government investigation.

i. The Alleged Newly Discovered Evidence

(a) Israel Schwimmer's Recantation

In support of this motion, the defendant submitted several compact discs containing audio recordings, along with a transcript ("Def. Ex. A to the Rule 33 Mtn."), of an interview that his new counsel, Michael L. Soshnick, Esq., conducted with Israel Schwimmer on September 9, 2005. The interview was conducted in Soshnick's law office and was recorded without Schwimmer's knowledge. Israel Schwimmer came to the interview accompanied by Abraham Lichtenstein, who the defendant

characterizes as Schwimmer's "confidante." Also present at the meeting were Soshnick's investigator John Dabrowsky, and defendant's co-counsel Adrian L. DiLuzio, Esq.

The meeting lasted more than two hours and mostly involved a wide-ranging discussion of the history of the disputes between the Nat Schlesinger and the Jack Schlesinger families. The manner in which Israel Schwimmer discussed the dispute between the families was substantially different from his testimony on the stand at the trial. His answers were lengthy, at times detailed, and at times rambling and irrelevant. Schwimmer was extremely talkative and sounded anxious to speak, often cutting off the other participants in the interview, or changing the subject of the conversation unexpectedly.

Schwimmer described at length why the two sides of the family essentially hated each other over disputes that in large part arose after Jack Schlesinger died. The claim of Jack's family members was that Nat Schlesinger was trying to cheat them out of millions of dollars. As a result, Schwimmer stated that they were involved in intense litigation to get their perceived fair share. Some of the litigation involved disputes over personal residences.

Schwimmer stated that his brother-in-law Victor Schlesinger called Atlantic Mutual after the 1998 fire "because we were fighting about my house, we were fighting about the [estate of Jack Schlesinger], the money, and we saw we couldn't get out anyway." Def. Ex. A to the Rule 33 Mtn. at 28. Schwimmer continued on to state that the

call that Victor made contained "a lot of lies" to Atlantic Mutual when he informed them that Nat Schlesinger caused the fire and that Nat called it a "job well done."

Schwimmer stated that he had pressure from his mother-in-law, his wife, and his brother-in-law to back the lies that Victor told to Atlantic Mutual. Once Victor made statements to the government, Schwimmer stated that he was brought into the lie "in order to make this look a hundred percent ..." and was told what to lie about and what to say. Def. Ex. A to the Rule 33 Mtn. at 31-32.

In response to a question of whether Schwimmer received "a secret promise" from the government to testify, Schwimmer responded: "I never got anything." Def. Ex. A to the Rule 33 Mtn. at 34-35. Soshnick persisted, by asking, "What I'm hearing from you is that it was your understanding that if you testified against Nat, no harm would come to you or your family members." Schwimmer responded, "To tell you the truth, no, no written, no written promise, no nothing, no written promise, no nothing." Def. Ex. A to the Rule 33 Mtn. at 34-35.

The interview continues with Schwimmer explaining why he decided to change his testimony. Schwimmer explains: "The Torah, the Jewish law, ... the law says over there, even Nat, even somebody bother you he threaten you — I'm not talking about killing — you're not allowed to go testify against another Jew." Def. Ex. A to the Rule 33 Mtn. at 44.

In response to Soshnick's questioning, Schwimmer easily responds that he "was lying by the Grand Jury and by the trial." Def. Ex. A to the Rule 33 Mtn. at 56. However, when pressed by Soshnick and Diluzio for details, Schwimmer only admitted to lying about two parts of his testimony, and actually reaffirmed most of the remaining part of his trial testimony. When asked whether he saw Nat Schlesinger removing papers from the building prior to the fire, Schwimmer stated, "That's a problem. That's true. Because you know why? ... My wife saw that too." Def. Ex. A to the Rule 33 Mtn. at 57. Schwimmer explains, in more detail than he testified to at the trial, that he saw Nat moving about four shopping bags of paperwork. When he saw this he called his wife on the telephone and said, Nat is moving paperwork. She watched from the window of her home and also saw him taking out the paperwork.

When asked about his testimony about overhearing the statement "job well done," Schwimmer responded that this was "Baloney" and a "real, real, lie." Def. Ex. A to the Rule 33 Mtn. at 59. He also describes this testimony as "Bullshit," and "It's a lie." Def. Ex. A to the Rule 33 Mtn. at 90-91. When asked about whether he heard Abraham Weiser state that he was going to lock up the third floor, Schwimmer responded, "Bullshit." Def. Ex. A to the Rule 33 Mtn. at 87-88. However, when pressed for details, Schwimmer indicates that he really could not recall what he testified to at the trial, but insists that whatever it was, it is a lie. For example, Dabrowsky asks if

he recalled the conversation between Weiser and Nat Schlesinger, Schwimmer responds "That what-what? ... What I keep forgetting, it's a lie." Def. Ex. A to the Rule 33 Mtn. at 95.

During the interview Soshnick tells Schwimmer that Dabrowsky is going to prepare an affidavit for him to sign that would state that he recants his prior testimony. However, upon completion of the interview, Israel Schwimmer advised the other participants that, before swearing to and signing an affidavit embodying the essence of the conversation, he wished to speak with his own attorney. He wanted to do this because he had been advised that neither Soshnick nor DiLuzio could serve as his attorney. Schwimmer asked for a week to consider the request to sign and swear to an affidavit. Counsel for the defendant did not further hear from him. Schwimmer never signed an affidavit or otherwise confirmed his statement about the interview, under oath.

(b) Signed Statement of David Ganz

In addition to the taped interview, the defendant submitted numerous statements from persons who purport to know Israel Schwimmer in order to corroborate his recantation. David Ganz, described as a seventy year old father of five who knew the defendant and his brother Jack from as far back as 1957, signed a statement prepared by the defendant's investigator. In the statement, he claims to have met Israel Schwimmer at the Schlesinger business some two and one-half years ago. He states that he spoke to Schwimmer about

resolving the money dispute between the families that also involved Schwimmer's house. Schwimmer's response was: "I will do whatever I can to bury Nat alive." Def. Ex. C to the Rule 33 Mtn.

(c) Ruling by Rabbi Gruber on behalf of the Rabbinical Court (Beis Din Tzedek)

Prior to the meeting with Soshnick, Israel Schwimmer allegedly went to Rabbi Y. Gruber to seek guidance. The defendant claims that Schwimmer told Rabbi Gruber that he was under duress from his wife's family, and that such duress caused him to testify falsely against the defendant at the trial. Schwimmer allegedly further advised Rabbi Gruber that he wanted to correct his wrongdoing even though he understood that, as a result of doing so, he could be legally punished for his false testimony. Rabbi Gruber advised him that he must do everything he could to recant his testimony.

After Schwimmer met with Soshnick, Rabbi Gruber believed that Schwimmer had not done the "utmost" to recant, but that he had merely attended the meeting with Soshnick. As a consequence, on September 29, 2005 Rabbi Gruber, on behalf of the Rabbinical Court, issued a Beis Din Tzedek, declaring that: "anyone who has influence with Mr. Schwimmer is obligated to convince him that he should not evade from what is incumbent on him to do for the sake of truth and justice." Def. Ex. D to the Rule 33 Mtn.

(d) Affidavits from Certain Members of Israel Schwimmer's Family

In the defendant's reply to the government's opposition to the motion for a new trial, the defendant submitted additional affidavits of persons related to Israel Schwimmer commenting on his trial testimony, including Israel's father Joseph Schwimmer (Ex. K); Israel's brother-in-law Morris Gelbstein (Ex. L); Israel's brother Berish Schwimmer, (Ex. M); and Israel's sister Sarah Rosenfeld (Ex. N).

Joseph Schwimmer's affidavit states that his son "personally informed me that he did not testify truthfully at the trial of Nat Schlesinger." In addition, "[h]e further told me that he was under tremendous pressure from his wife's family because they wanted revenge against Nat Schlesinger." Joseph Schwimmer also states that Israel told him that he felt sorry for what he had done. Joseph also opined that Israel is in psychiatric care "as a result of the tremendous pressures put on him by his wife's family." Def. Ex. K to the Reply to the Rule 33 Mtn.

Morris Gelbstein states in his affidavit that he had a conversation with Israel Schwimmer in the Fall of 2005, in which Schwimmer told him that "people could not understand how much pressure he was under from his wife and her family, and that his actions would be seen differently if they could only understand what he was going through." At one point, Gelbstein states that he told Israel

that Nat thought he could win at the trial, to which Israel replied: "He didn't know that he was fighting against my wife." Def. Ex. L to the Reply to the Rule 33 Mtn.

Berish Schwimmer states in his affidavit that he spoke to his brother many times before and after the trial. He states that before the trial, Israel "told me that his wife's family planned to teach Nat Schlesinger a lesson." After the trial, Israel was upset that he had given false testimony, but felt he had no choice because of pressure from his wife and the government. Israel told him that he was threatened by the government to be put in jail if he backed out of testifying at the trial by claiming a loss of recollection. Berish Schwimmer also claims that he has "been witness to the abuse of my brother by his wife." She allegedly ridiculed Israel in front of him, "calling him 'useless' and 'a coward who can't sleep at night' because he was afraid of giving testimony in court." Berish also claims that Miriam Schwimmer took away Israel's mobile phone.

Berish Schwimmer also refuted the notion that Israel was under adverse community pressure because he testified at the trial. "At no point has there been any organized community pressure against my brother. On the contrary, although certain individual members of the community may be angry with him, the rabbis and community leaders have expressed their sympathy and concern for him." Berish also noted that "[m]y brother has told me on numerous occasions that he lives in terror of his wife and her family." Def. Ex. M to the Reply to the Rule 33 Mtn.

Sarah Rosenfeld claimed in her affidavit to have witnessed Israel being "abused" by his wife. She claimed that his wife on prior occasions had taken his glasses, driver's license, and mobile phone, hit him, and threw him out of the family home. Def. Ex. N to the Reply to the Rule 33 Mtn.

(e) Signed Statements of Members of the Community Regarding Victor Schlesinger's Testimony

The defendant annexed four signed statements provided to defense investigators stating that Victor Schlesinger had lied to the government and at the trial. David Ganz signed a statement describing a conversation he had with Victor at or near Passover, 2005. Ganz claims that Victor Schlesinger told him he was making up stories about Nat setting the fire in question. Ganz advised him "not to commit such a capital crime as to make up a lie about Nat Schlesinger." In the discussion that ensued, Victor grew increasingly angry and yelled that "he would do and say anything and whatever it takes to bury Nat for life." He admitted that he would lie to get revenge for his mother and acknowledged that he could lie about the "fire case." Def. Ex. C to the Rule 33 Mtn.

Moshe Kestenbaum, described as a forty-seven year old Brooklyn resident, provided a signed statement in which he revealed conversations with Victor Schlesinger regarding the monetary dispute between the families. Victor told him that, if he could not get the money, he would put Nat in jail, and that he would tell the government a few things and they would believe him because the

defendant was a convicted felon. He further told Kestenbaum that the allegations he made didn't have to be true, and that he was capable of making up a good story that would put Nat in jail. After Nat's indictment, Kestenbaum declared that Victor crowed: "Now do you believe me what I told you a long time ago." Def. Ex. E to the Rule 33 Mtn.

Moses Friedman, described as a fifty-seven year old father of eight, provided a signed statement describing how, at Jack Schlesinger's shiva, he endeavored to reconcile the family dispute. Victor told him it was his desire to get Nat and that he could get a watermelon indicted. Def. Ex. F to the Rule 33 Mtn.

Luzer Endzwerg, stated that he prayed at the same schul as Victor Schlesinger and was aware that he was fighting over money with his uncle Nat. He claims that "other people who prayed there expressed doubt that [Victor] would ever get his money." Victor assured them he would because "I will put him in jail." Def. Ex. G to the Rule 33 Mtn.

(f) Affidavit of Private Investigator Warren Flagg

In support of his claim that the government failed to reveal promises of leniency and impeachment evidence of which it was aware regarding Victor Schlesinger prior to the trial, the defendant attached an affidavit from private investigator Warren Flagg. In the affidavit, Flagg claims that he contacted Keith Hoheimer, the Special Agent in charge of investigations for

the Chicago office of the Small Business Administration ("SBA") regarding a prior investigation by the SBA into bank fraud allegations against Foodland Industries. Foodland Industries is a rice cake manufacturing business located in Brooklyn, New York, that was co-owned by Victor and Michael Schlesinger. According to the investigation, Foodland Industries fraudulently attempted to obtain an SBA loan from the Security State Bank. Def. Ex. H to the Rule 33 Mtn.

Hoheimer allegedly told Flagg that Victor and Michael Schlesinger were "subjects of the investigation for bank fraud" and that the case was "a slam dunk." Hoheimer further described the strength of the government's case as follows: "I have never had a stronger false identity bank fraud case presented to the United States Attorney's office in Minnesota." According to Flagg, Hoheimer was so certain that arrest warrants would be forthcoming that he telephoned the New York office of the FBI for assistance in making the arrests of Victor and Michael Schlesinger. However, the case never proceeded because the United States Attorney's office declined prosecution in June, 2004.

Flagg states that Hoheimer was frustrated and wrote a report to the SBA in Washington, D.C., with the hope of having the prosecution reinstated. Counsel for the defendant attempted to obtain the details of reports concerning this investigation, and the reason for its closure, under the Freedom of Information Act. The request was denied on the ground that defense counsel had no standing to request such disclosure.

(g) Additional Evidence of the Minnesota Investigation

In the defendant's reply to the government's opposition to the motion for a new trial, the defendant submitted additional evidence concerning the Minnesota investigation. This includes affidavits from David Hasskamp, the landlord for Foodland Minnesota; Dennis Baumann, the production manager of Foodland Minnesota; Keith Bjella, the general manager of Foodland Minnesota; Jacob Schwartz, the accountant for Foodland in both New York and Minnesota; and Doron Zanani, Esq., the attorney who at one time represented both corporations. These affidavits provide many details about the alleged fraud. For example, the affidavits include pictures of Victor and Michael Schlesinger and statements from the affiants who live in Minnesota identifying these individuals as persons who were in business in Minnesota.

ii. The Government's Response

The government opposed the defendant's motion for a new trial after conducting an investigation into the allegations. The government attached affirmations by the agents involved in the investigation and the attorneys involved in the prosecution, stating that there were never any promises of leniency in regard to any alleged criminal conduct by Israel Schwimmer.

The government also attached an affirmation of Miriam Schwimmer, Israel Schwimmer's wife, which states the Schwimmer began to experience intense community pressure prior to his testimony at the trial and during his testimony by packing

the courtroom with Nat Schlesinger supporters. Prior to testifying, Schwimmer was warned that if he testified against the defendant "he would be labeled a 'mosser' (traitor); [his] children would be expelled from the private school they attended and he would be ostracized by the Williamsburg community." Aff. of Miriam Schwimmer at 1.

The affirmation also states that the community pressure did not end with Nat Schlesinger's conviction. In fact, the community pressure increased as the defendant's family and friends began distributing copies of Israel Schwimmer's grand jury testimony and created leaflets advising Schwimmer to leave Williamsburg for his own safety. Schwimmer's children were also allegedly targeted as a result of their father testifying against the defendant. For example, Miriam Schwimmer claims that her son was told he would not be permitted to read from the Torah at his Bar Mitzvah.

The government submitted an affirmation of Victor Schlesinger, reaffirming that his testimony in the grand jury and at trial was accurate. It also states that Victor Schlesinger never met with Schwimmer to create testimony or to create lies to use against the defendant.

In response to the allegations of prosecutorial misconduct, the government conducted an investigation into the Minnesota fraud case. Special Agent Hoheimer reported that the Minnesota Case was premised almost entirely upon information provided by a confidential informant named Samuel Schlesinger, who is Nat Schlesinger's son. In addition, Victor Schlesinger's name did not appear anywhere on any document connected

with the subject loan. Further, the SBA never interviewed anyone other than Sam Schlesinger in furtherance of the investigation nor did they contact either target or otherwise notify them of the pending investigation. Special Agent Hoheimer stated that there was no contact about the Minnesota investigation with anyone from the United States Attorneys Office for the Eastern District of New York or any of the agents or government agencies assigned to investigate the Schlesinger case.

Assistant United States Attorney Frank McGill was the AUSA responsible for declining the prosecution of the Minnesota Case. He was interviewed and stated that the United States Attorneys Office for the District of Minnesota declined the case for several reasons, including the age of the loan and the fact that the SBA failed to identify the recipients of the loan proceeds. The United States Attorneys Office for the District of Minnesota took no further action after declining the prosecution. AUSA McGill further stated that he never spoke with any representative of the United States Attorneys Office for the Eastern District of New York, or any of the agents or government agencies assigned to investigate the Schlesinger case.

D. Post Trial Evidentiary Hearing

On April 21, 2006, the Court issued an order scheduling an evidentiary hearing on the claims of prosecutorial misconduct to resolve the disputed facts and to develop the record on the materiality of the alleged *Giglio* material, as well as the government's actual or constructive knowledge of

such information. As to the Schwimmer recantation, the Court stated that although an evidentiary hearing was not required under *United States v. DiPaolo,* 835 F.2d 46, 50 (2d Cir. 1987), a hearing would be "helpful in evaluating the credibility and materiality of Schwimmer's alleged recantation that was neither sworn to nor taken under oath." Order dated Apr. 21, 2006 at 7. Further, the Court set the parameters for this part of the hearing by stating that it would hear "testimony from Israel Schwimmer for, among other matters, testimony as to the alleged recantation of his former testimony during the grand jury and the trial ...," and "any additional relevant evidence." *Id.*

1. Testimony of Israel Schwimmer

On April 21, 2006, the same day the Court ordered an evidentiary hearing, the government produced Israel Schwimmer for the purpose of testifying as to his alleged recantation. At the hearing, Schwimmer essentially repudiated his recantation. Schwimmer explained on direct examination by the government that due to the community pressure he was subjected to after testifying at the trial, he had made certain out-of-court statements that were untruthful. Schwimmer also testified that his trial testimony was the result of a trial subpoena and not in exchange for any promises of leniency from the government. Schwimmer explained that following his testimony at the trial, he was subjected to threats and intimidation from supporters of the defendant in the Williamsburg community. The threats and intimidation tactic employed by supporters of the defendant included berating

Schwimmer on the street and in temple; threatening to expel Schwimmer's children from their private religious school; and disseminating transcripts of Schwimmer's grand jury and trial testimony throughout the community.

Schwimmer also testified that he observed numerous leaflets "all over the streets and synagogues" of his neighborhood in Brooklyn advising that people should not speak with him and he should not be allowed in synagogues to pray. One of the leaflets was particularly harsh, "warning" members of the community, and vilifying Israel Schwimmer and Victor Schlesinger. The leaflet was translated from Hebrew to English at the hearing, as follows:

> Warning!
>
> Everybody knows that the two named informants are sinners of Israel, the known bad and cruel persons, are Victor Schlesinger, may his name be erased, together with his brother-in-law who has at the same time, who have together informed almost about almost ten Jewish people who had committed no sin. This is the bad person Israel Elimelech Schwimmer. May his name be erased.
>
> They went with unheard cruelty and informed about their uncle with lies and inventions Naftali Zvi Schlesinger. And they caused that he should be sitting and suffering in a heavy jail, suffering both in his body and in his soul. And he's expecting a heavy sentence from the judge towards a life-long imprisonment. May the Lord have pity on him.

The Lord will not allow it. And it this was not enough, and in the last few days that when the Judge is getting ready to render his sentence Jews are watching and praying to the Lord for a lighter sentence.

He went their mother, their mother, the bad women Fareidel Schlesinger, who hides herself behind the persona of innocent and broken widow and they submitted damaging information and, together with lies and falsehoods, as is their way, in order to add fuel and secure that the[ir] will be no room for commiseration from the judge.

Warning. Those dark sinners have still not taken into consideration Zvi as how the Jewish blood is being spilled from Naftali Zvi, Ben Hirifka.

Dear Jews: How can we stand by with indifference? How can we say that our hands have not spilled that blood? Let us spit them out from the community of Israel.

There also must be a roaring scheme that they are not pure, the two dark sinners and criminal who try all the time to hide behind the one that is sending them to speed evil and this is the bad person Scmuel Yona Schlesinger and his brother, the known person and enemy, the usurper, Gershon Schlesinger, who run around all the time threatening whoever is standing in their way. Remember, it is the time for judge and judgment.

Gov't Ex. 1, Hr'g Tr. 327-29. After this was read in Court, Israel Schwimmer appeared visibly upset and in obvious distress.

The defendant's counsel conducted an excruciatingly thorough cross-examination of Schwimmer that, according to the government, lasted for more than 11 hours over the course of three days. During the course of his testimony on cross-examination Schwimmer was evasive and non-responsive. Schwimmer often asked for the question to be repeated and responded time and time again that he could not recall anything from the interview conducted by Soshnick where he recanted his trial testimony, due to the enormous community pressure he was under. Defense counsel read portions of the transcript and played numerous sound recordings in an attempt to refresh Schwimmer's recollection. Although Schwimmer reluctantly acknowledged that it was his voice on the recording and that he was in Soshnick's office at the time, the plethora of attempts at refreshing his recollection as to the substance of the interview were all unsuccessful. After reading the transcript of the interview Schwimmer stated, "I read some portion of the transcript, and I see it and I don't know how I said it. It can't be, because I testified truthfully at the trial." Hr'g Tr. at 170.

Faced with a blistering cross-examination, Schwimmer apparently resorted to admitting to a series of unlikely questions that were repeated by defense counsel throughout the lengthy examination. For example, upon questioning from defense counsel, he admitted he was "drugged"

by Abe Lichtenstein on their way to Soshnick's office, and that Lichtenstein told him to "drink, drink, drink" from two "colorful" bottles on the dashboard of his car. Hr'g Tr. at 78-81, 83-84. He claimed that, as a result of the drugging, he was "dizzy," "sweating all over," and was not in his "full mind." Hr'g Tr. at 71, 77, 82. He additionally asserted that he was forced to remain at this meeting because he was "trapped" by people stationed at the door who prevented him from leaving the office. Hr'g Tr. at 75, 80-81.

However and significantly, during the cross-examination Schwimmer continually re-affirmed that he had provided truthful testimony during the trial of Nat Schlesinger. For example, Schwimmer stated "I never lied at the trial or in the grand jury." Hr'g Tr. at 146. "Again, whatever I testified at the grand jury and the trial, that's the truth." Hr'g Tr. at 148. "The trial was true. The grand jury was true." Hr'g Tr. at 171. "I told you the truth before, that I never lied on the trial, so what do you want now?" Hr'g Tr. at 217. "I never lied." Hr'g Tr. at 282. "I said I never lied in the grand jury." Hr'g Tr. at 287. "I did not perjure myself." Hr'g Tr. at 311.

When questioned by the Court, Schwimmer also confirmed that his trial testimony was truthful and that he went to Soshnick's Office only to relieve the adverse community pressure.

> THE COURT: He is asking you, when you came to his office and you said it was for the purpose of taking off the pressure as Mr. Lichtenstein said he would do, right?

THE WITNESS: Yes.

THE COURT: When you told these things to Mr. Soshnick in his office, were you telling the truth?

THE WITNESS: I didn't, no.

THE COURT: You didn't say the truth?

THE WITNESS: At his office, no.

THE COURT: Pardon?

THE WITNESS: At his office I didn't say the truth.

THE COURT: You did not say the truth?

THE WITNESS: In his office, no.

Hr'g Tr. at 168.

2. Testimony of Abraham Lichtenstein

Abraham Lichtenstein accompanied Israel Schwimmer to the meeting with Soshnick. Lichtenstein described himself as an active and official community liaison in the Williamsburg community. Hr'g Tr. at 450. Lichtenstein testified that Schwimmer approached him in the beginning of August 2005 and asked him to help him because he had told lies before the grand jury and at the trial. In response, Lichtenstein offered to take him to see Nat Schlesinger's attorney, and Schwimmer told him that he would go anywhere "as long as I can come in and say the truth." Hr'g Tr at 441. Schwimmer revealed to

Lichtenstein that he was hesitant to cooperate with him, saying that his wife would "kill" him. Hr'g Tr. at 441. Lichtenstein stated that on the day he picked him up to go to Soshnick's office, Schwimmer threw himself on the floor of the car so that he would not be seen until he had left his neighborhood.

On cross-examination, Lichtenstein admitted that he had known the defendant Nat Schlesinger for approximately 15 years and that one of the reasons that Schwimmer contacted him "was that he knew [Lichtenstein] was friends with the defendant Nat Schlesinger." Hr'g Tr. at 458, 465. Lichtenstein also testified that Schwimmer asked him "to tell the defendant to stop his children from putting pressure in the community." Hr'g Tr. at 468. In addition, Lichtenstein admitted that in the past he had sold materials to Victor Schlesinger and that the business relationship between the two had ended in litigation.

3. Testimony of Susan Necheles, Esq.

Susan Necheles, Esq., a criminal defense attorney, testified that she was contacted by individuals from the Satmar Hasidic community and asked if she could represent Israel Schwimmer. Necheles was unable to recall who first contacted her about representing Schwimmer, but in response she set up a preliminary meeting. Necheles testified that the preliminary meeting was not attended by Schwimmer but by four or five men who she could not identify except for saying that she

thought they were members of the Satmar Hasidic community. In the meeting she stated she needed to meet with Schwimmer in order to represent him in a matter. This meeting was eventually arranged.

Prior to meeting with Schwimmer, Necheles stated that she was confronted by Schwimmer's wife while at work in her law office. Necheles testified that Mrs. Schwimmer barged into a meeting she was conducting in her office and told her not to meet with her husband. Mrs. Schwimmer told her that her husband had been kidnapped and that if he did meet with her it was not of his own free will.

Necheles eventually did meet with Schwimmer on March 5, 2006, under unusual circumstances. Schwimmer was brought to Necheles' home by "two or three other men ... all named Schwimmer." Hr'g Tr. at 630. Necheles inquired about whether Schwimmer was attending of his own free will and he told her that he was. Schwimmer stated that he had been beaten by his wife and that she had taken his glasses and medication away from him. Necheles then proceeded to speak to Schwimmer and the unidentified individuals about lying at the trial, and agreed to represent him if he paid a $25,000 retainer. Part of this retainer, in the amount of $10,000, was eventually paid by someone who she could not identify.

During the meeting Schwimmer told Necheles that he had a meeting with Soshnick at which he said that he lied at the trial. Schwimmer further stated that he had been pushed to testifying at the trial by his wife's family and that such testimony violated his religious beliefs. As to specific

testimony, Necheles stated that Schwimmer told her that at the trial he had lied about: (1) the statement "good job;" (2) knowing the content of the documents that were removed from the building; and (3) the statement "don't lock the doors." Hr'g Tr. at 634.

Necheles also testified that Schwimmer discussed the religious edict that was issued by Rabbi Gruber declaring that he needed to tell the truth about lying at the trial. Necheles explained that there exists a Jewish teaching known as "maseera," which prohibits Jews from going to civil authorities to bring disputes with other Jews. Instead, they should bring those disputes to the religious authorities in the religious court known as Beis Din Tzedek. She further explained that a "mooser" is somebody who goes to authorities and tells about other people in the community. Necheles stated that Schwimmer told her that the religious edict issued about him involved "maseera."

One or two days after the meeting Necheles received a letter purporting to be from Schwimmer, requesting that she be discharged as his counsel and return the retainer. Necheles stated that she did nothing in response to the letter, but understood that her services had been terminated. She did not return the $10,000 retainer or attempt to collect the remaining $15,000.

4. Testimony of Doran Zanani, Esq.

Doran Zanani, Esq., testified about his representation of Foodland Industries, the rice cake manufacturing business located in Brooklyn, New York, that was co-owned by Victor and Michael Schlesinger. He stated that he was retained by Foodland Industries in order to create a second Foodland entity in Minnesota. Zanani testified that to the best of his knowledge Victor Schlesinger was not a record owner or shareholder of the Minnesota-based Foodland Industries entity. Zanani's dealings in connection with the Minnesota-based Foodland entity were principally with Gary Schlesinger whom he believes is the record owner of the entity and who filed a bankruptcy petition on its behalf. Zanani testified that he had conversations with an individual named Victor Schlesinger who told him that he had provided "funding" for the Minnesota-based Foodland Industries entity. Zanani believed Victor Schlesinger had a financial interest in the company and that he was exerting influence over the corporation through his brother Michael Schlesinger.

5. Testimony of Government Agents in the Minnesota Investigation

Keith Hoheimer of the SBA's Office of the Inspector General was the supervising agent in the Minnesota investigation. The investigation was assigned to Special Agent Tom Heinzer. Hoheimer testified that he initiated the investigation into Michael and Victor Schlesinger in February 2002 after receiving a tip from Sam Schlesinger, the defendant's son. The investigative matter concluded when the United States Attorney's Office in

Minnesota declined to prosecute the case on the grounds that the loan was old and the information developed was not sufficiently material to develop a prosecution.

Hoheimer stated that he had no contact with anyone from the United States Attorney's Office for the Eastern District of New York regarding the Minnesota investigation. Hoheimer testified that the only contact he had with any government agents located in New York was with Special Agent Charles Walkowiak of the Federal Bureau of Investigations in New York and with Postal Inspector Rich Delisio of the United States Postal Inspection Service in New York. Hoheimer contacted Walkowiak to request help with the investigation in New York. Delisio assisted Hoheimer in inquiring about a bankruptcy filing made by Gary Schlesinger.

Heinzer also testified that he had no contact with anyone from the United States Attorney's Office for the Eastern District of New York regarding the Minnesota investigation. Heinzer testified that the only additional contact he had with New York agents involved a request in an unrelated matter to provide assistance with a photo lineup of subjects in an investigation.

The two New York based agents that were contacted about the Minnesota investigation also testified. Special Agent Charles Walkowiak of the FBI testified that he received a telephone call from Hoheimer, concerning an alleged fraud perpetrated by a man named "Schlesinger." Agent Walkowiak testified that he received some paperwork from Hoheimer summarizing the investigation of Foodland Industries, and that

he merely reviewed FBI indices because he recalled a reference to Foodland in an earlier investigation he had conducted. Agent Walkowiak testified that he took no action in the investigation because he did not know how he could "help on a case with a violation that allegedly occurred in Minnesota...." Hr'g Tr. at 494. Agent Walkowiak confirmed that he did not contact anyone at the United States Attorney's Office for the Eastern District of New York in connection with the matter because he "had nothing to present." Hr'g Tr. at 497-98.

Postal Inspector Delisio also testified that he had no contact with anyone from the United States Attorney's Office for the Eastern District of New York regarding the Minnesota investigation.

II. DISCUSSION

A. The Legal Standard in a Motion for a New Trial

Rule 33 permits a defendant to seek a new trial based on newly discovered evidence within three years of the verdict. The rule states that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed.R.Crim.P. 33. This standard gives the trial court "broad discretion to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Ferguson,* 246 F.3d 129, 133, 134 (2d Cir. 2001) (quoting *United States v. Sanchez,* 969 F.2d 1409, 1413 (2d Cir. 1992)). In deciding the motion the district court must examine the entire case and may weigh the evidence and the credibility of witnesses, but it must be careful not to "wholly usurp" the role

of the jury. *United States v. Autuori,* 212 F.3d 105, 120 (2d Cir. 2000). Rule 33 authority should only be used "sparingly" and in "the most extraordinary circumstances." *Sanchez,* 969 F.2d at 1414.

The Second Circuit has frequently and repeatedly held that, "even where newly discovered evidence indicates perjury, motions for new trials 'should be granted only with great caution and in the most extraordinary circumstances.'" *United States v. Stewart,* 433 F.3d 273, 296 (2d Cir. 2006); *United States v. Spencer,* 4 F.3d 115, 118 (2d Cir. 1993); *Sanchez,* 969 F.2d at 1414 (2d Cir. 1992); *DiPaolo,* 835 F.2d at 49; *United States v. Stofsky,* 527 F.2d 237, 243 (2d Cir. 1975); *United States v. Costello,* 255 F.2d 876, 879 (2d Cir. 1958).

Generally, in a motion for a new trial based on newly discovered evidence the defendant must initially make the threshold demonstration that the proffered new evidence: (1) could not have been discovered with due diligence before or during the trial; (2) is material; and (3) is not cumulative. *See United States v. Canova,* 412 F.3d 331, 349 (2d Cir. 2005); *United States v. Middlemiss,* 217 F.3d 112, 122 (2d Cir. 2000); *United States v. Gallego,* 191 F.3d 156, 161 (2d Cir. 1999), *abrogated on other grounds by Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *United States v. Siddiqi,* 959 F.2d 1167, 1173 (2d Cir. 1992); *United States v. Alessi,* 638 F.2d 466, 479 (2d Cir. 1980). It is within this general

framework that the Court will wade through the great amount of alleged new evidence that the defendant has submitted in support of his motion for a new trial.

B. As to Israel Schwimmer's Recantation

The most substantial item of newly discovered evidence submitted in this motion for a new trial is the surreptitiously recorded recantation of Israel Schwimmer. Courts have long been "particularly reluctant" to grant a motion for a new trial "where the newly discovered evidence consists of a witness recantation as such recantations are 'looked upon with the utmost suspicion.'" *DiPaolo,* 835 F.2d at 49 (quoting *United States v. Troche,* 213 F.2d 401, 403 (2d Cir. 1954)); *see Gallego,* 191 F.3d at 165; *Bagby v. Kuhlman,* 932 F.2d 131, 136 (2d Cir. 1991) ("[T]here is overwhelming reason to question the statements' genuineness."); *United States ex rel. Sostre v. Festa,* 513 F.2d 1313, 1318 (1975); *Harrison v. United States,* 7 F.2d 259, 262 (2d Cir. 1925).

When the proffered new evidence consists solely of a recantation, in order to succeed on a motion for a new trial the defendant must prove: (1) the testimony recanted was both false and material; (2) without the false testimony the jury probably would have acquitted the defendant; and (3) that the party seeking the new trial was taken by surprise when the false testimony was given and could not address that falsity until after the trial. *DiPaolo,* 835 F.2d at 49; *Stofsky,* 527 F.2d at 246; *United States v. Lespier,* No. 398CR102AHN, 2006 WL 533792, at *7 (D.Conn. March 1, 2006). The defendant bears the burden of satisfying each

of the elements in the three-part test. *Id.; DiPaolo,* 835 F.2d at 49 (citing *United States v. Brown,* 582 F.2d 197, 202 (2d Cir. 1978)). Schwimmer's taped recantation falls far short of proving either of the first two prongs.

1. The Scope and Materiality of the False Testimony

Initially turning to the second element, the Court does not find that without the recanted testimony the jury may have reached a different verdict. Although the attorneys for the defendant consistently argue throughout all phases of the motion in broad and sweeping language that Schwimmer lied to the grand jury and at the trial, a closer examination of the two hour taped interview reveals that Schwimmer only recanted two specific items of his trial testimony. In particular, Schwimmer recanted his testimony that he overheard the statement "job well done," and that he heard a conversation in which Abraham Weiser stated that he was going to lock up the third floor.

The Court finds that Israel Schwimmer's recantation of these two items of evidence would have little impact on the totality of the evidence that was presented on the arson counts. Other more credible evidence established both of these items with greater detail at the trial. The Court recalls that at the trial Israel Schwimmer's entire testimony was short, restrained, vague, undetailed and could be viewed as somewhat unpersuasive. In contrast, more detailed and compelling evidence was presented that corroborated these two items. Victor Schlesinger testified at length

about the circumstances, the declarant, and the tone of the statement "job well done." There was also evidence that regardless of whether Abraham Weiser stated he was going to lock up the third floor, the firefighters found that the third floor was locked the night of the fire along with the exterior entrances of the building, and that only the defendant and his brother had keys to the entire building. Even if the jury were to reject Israel Schwimmer's testimony as to these two items, other more credible evidence existed to sustain the verdict of guilty on the arson counts. Accordingly, the Court finds at the outset that the recanted evidence is insufficient to disturb the outcome of the trial.

Notably, Schwimmer did not recant with regard to other key evidence that he testified to at the trial. Indeed, during the interview Schwimmer reaffirmed portions of his trial testimony with even greater specificity than he had previously. At the trial, consistent with his restrained and somewhat evasive testimony, Schwimmer provided little details about observing, on the day of or a day prior to the fire, the defendant and his son David Schlesinger removing about four or five bags of papers from the defendant's file cabinets. However, in the interview with Soshnick, Schwimmer confidently states several times that not only did he see Nat Schlesinger removing papers from the building prior to the fire, but that he called his wife and she observed it as well.

2. The Repudiation of the Recantation

On April 21, 2006, Israel Schwimmer testified at the evidentiary hearing, and essentially repudiated his recantation. A recantation that is repudiated is not only factually significant, but under the law, the character of the alleged "new evidence" undergoes a critical change. A recantation by a material witness is necessary to establish the first prong of the *DiPaolo* test, that is, "the falsity of the trial testimony." *Id.* at 50. If ultimately successful, the recantation stands as substantive evidence that may be used at the defendant's new trial if one is granted. *See id.*

On the other hand, a repudiated recantation, such as is present in this case, is not useful in establishing the falsity of the trial testimony. Rather, the repudiated recantation merely suggests that the witness is "completely irresponsible...." *See* Moore's Federal Practice-Criminal Procedure § 633.05 (2006); *see also United States v. Santiago,* 837 F.2d 1545, 1550 (11th Cir. 1988) (stating that a retracted recantation can hardly be considered "new evidence"); *Lespier,* 2006 WL 533792 at . Indeed, witness recantations are looked upon with such suspicion that the mere "failure of a defendant to produce or explain the absence of an affidavit of a recanting witness may be sufficient grounds for denying a motion for a new trial." *DiPaolo,* 835 F.2d at 50 (quoting *United States v. Ward,* 544 F.2d 975, 976 n. 2 (8th Cir. 1976)).

The recantation, once it is repudiated, is no longer substantive evidence that may be used at a new trial, but can only be used as impeachment evidence for the purpose of cross-examining the

witness. *United States v. Glantz,* 884 F.2d 1483, 1486 (1st Cir. 1989) ("A repudiated recantation is not substantial evidence, and can be used at a new trial only to cross-examine the witness."); *Lindsey v. United States,* 368 F.2d 633, 636 (9th Cir. 1967); *Lespier,* 2006 WL 533792 at *7; *see also* Charles A. Wright, Nancy J. King, Susan Klein & Sara N. Welling, Fed. Prac. & Proc.Crim.3d § 557.1 (2006). Impeachment evidence that bears only on credibility is generally not a sufficient basis for obtaining a new trial. *See United States v. Reyes,* 49 F.3d 63, 68 (2d Cir. 1995) (citing *Mesarosh v. United States,* 352 U.S. 1, 9, 77 S.Ct. 1, 5, 1 L.Ed.2d 1 (1956) and *Spencer,* 4 F.3d at 119).

Although, at the evidentiary hearing, most of Schwimmer's testimony on cross examination was evasive, unforthcoming, and unenthusiastic, two key themes in his testimony were consistently confident, contrite, and said with conviction. First, Schwimmer testified several times that at the end of the interview with Soshnick he was given an affidavit to sign, and he refused to sign it because it was not the truth. Hr'g Tr. at 290. Second, Schwimmer continually re-affirmed no less than ten times that he had provided truthful testimony during the trial of Nat Schlesinger. Hr'g Tr. at 61, 75, 80, 148, 164, 168, 171, 173, 217, 287 and 311. For example, Schwimmer firmly responded to defense counsel on several occasions that, "I never lied at the trial or in the grand jury." Hr'g Tr. at 146. In response to repeated accusations of falsifying his testimony, Schwimmer replied, "I told you the truth before, that I never lied on the trial, so what do you want now?" Hr'g Tr. at 217.

3. As to the Alleged Falsity of the Schwimmer Trial Testimony

Even if Schwimmer did not repudiate his recantation, the taped interview is unpersuasive in establishing the first prong of the *DiPaolo* test, that is, the falsity of Schwimmer's prior testimony. "[T]raditionally the recantation of testimony given on trial is looked upon with the utmost suspicion." *Sanders v. Sullivan,* 863 F.2d 218, 225 (2d Cir. 1988) (citations and quotations omitted). Disbelief of a recantation made outside of court is often a reasonable reaction. "[T]he formality of a court, the presence of the litigants, and the gaze of a judge induce witnesses to hew more closely to the truth than they do when speaking in private and attempting to appease the losing side's advocate." *Mendiola v. Schomig,* 224 F.3d 589, 593 (7th Cir. 2000). "Some witnesses fall prey to influences — perhaps the persuasive influence of a skilled advocate asking leading questions, perhaps the less wholesome influence of the defendant's friends." *Id.*

Schwimmer's recantation is fraught with all of these improper influences. The interview is filled with leading questions that suggested an answer. For example, in the following exchange counsel for the defendant is questioning Schwimmer about alleged promises of leniency from the government:

> Mike: Was that ever actually told to you, were you given a promise by the prosecutor that if you — (inaudible) — that with your testimony that neither you nor anybody of your family members would be prosecuted for anything?

Israel: They didn't say it out, but — (Yiddish) — this was it.

Mike: What I'm hearing from you is that it was your understanding that if you testified against Nat, no harm would come to you or your family members.

Israel: They didn't say it out. This was behind their backs.

Mike: That's what I'm asking you, was there some type of unwritten —

Israel: To tell you the truth, no, no written, no written promise, no nothing, no written promise, no nothing.

Def. Ex. A to the Rule 33 Mtn at 9.

Soshnick even tried to use metaphors to coax Schwimmer into saying that he received unwritten promises from the government, when he asked:

"What we're trying to ascertain right now is whether the government used the carrot and stick approach. You told us that they used the stick approach to the extent that if you don't testify consistently with your Grand Jury testimony you're going to jail for perjury.... So now we want to know, did they go in the other direction and use the carrot and say, and of course if you do testify consistently with your Grand Jury testimony you stand to get millions of dollars?"

Def. Ex. A to the Rule 33 Mtn. at 75-76. Schwimmer responded in a confused tone, and then clarified, "They didn't tell me that, no, no, they didn't tell it from [sic] me because I didn't." Def. Ex. A to the Rule 33 Mtn. at 76.

In addition, the hostile community pressure further leads to the unreliability of the recantation. Schwimmer had realistic reasons to fabricate his recantation. A review of the recording indicates that he sounds nervous and obviously was under intense religious and community pressure. Indeed, Schwimmer used the word "pressure" many times during the interview. Schwimmer stated, "We can not [sic] mention a word of pressure. I have no pressure. I have pressure by law from the Torah. I'm not going to heaven and I'm not allowed to lie. I don't want to mention the word pressure." Def. Ex. A to the Rule 33 Mtn. at 54.

Schwimmer eluded to the intense community pressure that he has been confronted with after he testified at the trial. He stated that many Rabbis in the community do not want him to pray in their synagogues. He asked Soshnick to tell Nat that he should speak to his kids and have them stop telling the Rabbis in the community that he is working with the government. Schwimmer explained, "See a lot of synagogues, they don't want to see me." Def. Ex. A to the Rule 33 Mtn. at 84. Schwimmer also stated "Let me tell you something, [Nat]'s willing to kill my wife the way it is." Def. Ex. A to the Rule 33 Mtn. at 80.

At one point Schwimmer even tried to negotiate a general release from Nat Schlesinger for all civil litigation. In response, Soshnick told Schwimmer that in exchange for the recantation he would recommend to Nat Schlesinger that he not take any action against Schwimmer, but states "that it's up to Nat to decide what action if any he wants to take against you, what action if any he wants his children to take against you." Def. Ex. A to the Rule 33 Mtn. at 127.

Towards the end of the interview the participants apparently try to explain why Schwimmer came to the attorney's office that day. Dabrowsky suggested that Schwimmer "reached out to the community that you wanted to come here and talk through Abe." Def. Ex. A to the Rule 33 Mtn. at 115. Diluzio further suggested:

> There was a meeting that took place. Present at the meeting were so and so. Here's how he came to the office.
>
> He came to the office because he was troubled, because he was concerned, and he expressed that concern to the people in the community. He was worried about what was going to happen to his immortal soul. He had very grave concerns.
>
> He was aware that he had lied. He was aware he was pressured. He didn't know how to relieve himself of that. He spoke to Abe who said, Look [sic], the only way you can relieve yourself of that is to go to Nat's attorney.

Def. Ex. A to the Rule 33 Mtn. at 115-16.

The circumstances under which the interview was conducted contribute to the Court's view that the recantation was unworthy of belief. In the meeting, Schwimmer was closeted with two experienced criminal defense attorneys for the defendant, a private investigator for the defendant, and Abraham Lichtenstein, a close ally of the defendant. At some point, it even appeared that Schwimmer believed that he was attending a meeting with an independent attorney that may represent him at some time in the future. Almost half of the interview was conducted before Schwimmer first finds out that Soshnick is representing Nat Schlesinger. Once notified, Schwimmer's demeanor noticeably changes. Schwimmer states "I'm taking things even [sic] you're gonna take me or not gonna." In response, Soshnick explains "Well let me say this to you, so that it's clear. Our client is, is Nat. And we're interested in, in trying to see if we can help Nat, because he's sitting in jail right now." Def. Ex. A to the Rule 33 Mtn. at 40-41. Schwimmer immediately reacts with surprise, stating, "So you are, you are a lawyer for Nat now." Def. Ex. A to the Rule 33 Mtn. at 40-41. Still unclear about the reason he was being interviewed by Soshnick, Schwimmer states later in the interview "you gonna [sic] be like my counsel ... [b]ut it is a problem because you're the counsel for Nat." Def. Ex. A to the Rule 33 Mtn. at 79. Soshnick clarifies, "Neither Adrian nor I represent you. Neither Adrian nor I can represent you because we're representing Nat in regard to the preparation of this Rule 33 motion." Def. Ex. A to the Rule 33 Mtn. at 84-85.

Even though Soshnick informed Schwimmer that he could not represent him, he proceeded to advise him that perjury carries a base offense level of 12 and that his prior criminal history is a category I under the United States Sentencing Guidelines. Def. Ex. A to the Rule 33 Mtn. at 108, 121. Soshnick concludes, "that puts you in a sentencing range of 10 to 16 months ...," but if Schwimmer were to plead guilty, "you're looking at 6 to 12 months." Def. Ex. A to the Rule 33 Mtn. at 122.

Abraham Lichtenstein also had a role in the interview. He is described by counsel for the defendant as Schwimmer's "confidant." It is apparent from the interview that Lichtenstein is not only aligned with Nat Schlesinger, but is also well-versed in the history of Nat Schlesinger and of his criminal case. Lichtenstein frequently speaks about the history of the Schlesinger family fight and about the case. At one point Schwimmer remarks about Lichtenstein's knowledge, "Yeah, yeah, yeah, yeah, yeah, yeah. He knows sometimes more better than me." Def. Ex. A to the Rule 33 Mtn. at 17-18. Lichtenstein later admits his knowledge, and perhaps refers to his alliance with Nat Schlesinger, stating, "I have little more knowledge of the case than these gentlemen have. I'm sure they looked into the case, but it's something *we* threw into their lap." Def. Ex. A to the Rule 33 Mtn. at 48 (emphasis added). When the interview turns to a discussion about Victor Schlesinger, Lichtenstein remarks "I'm gonna kill him." Finally, Lichtenstein, although not an attorney, demonstrates a knowledge of the law by remarking that "a level 12 [under the guidelines]

is 18 [months]." Def. Ex. A to the Rule 33 Mtn. at 108. Thus, the Court finds that Lichtenstein could not be viewed as Schwimmer's "confidant" or an unbiased disinterested witness in this case.

All of these one-sided influences in the interview must be viewed in the light of the turbulent atmosphere of community pressure depicted by the witnesses and the evidence submitted to the Court. It is clear that Schwimmer was under enormous pressure, from the community at large and at this meeting. The personal and pecuniary interest Schwimmer had against Schlesinger as a result of the ongoing family dispute is well supported by the evidence, and was advanced by the defendant at the trial. On the other hand, Schwimmer was under tremendous pressure to recant. Rabbis prohibited Schwimmer from praying at certain Synagogues and vicious fliers were distributed throughout the community denouncing and vilifying Schwimmer, proclaiming "May his name be erased." This Court cannot place credence in out of court statements made in such a hostile environment.

Scrutiny and skepticism of recantations is not only sensible, but it serves the dual purposes of protecting witnesses after the trial and promoting truthful testimony during the trial. By disbelieving recantations, when justified, judges protect witnesses such as Schwimmer, who, because of their testimony in court, have been subjected to scorn, fear, and intimidation. "Knowledge that

obtaining a recantation will not affect the outcome of the trial makes it less likely that defendants and their friends will hound witnesses after trial." *Mendiola*, 224 F.3d at 593.

In sum, the recantation submitted by the defendant clearly did not satisfy the first or second requirement for granting a motion for a new trial under *DiPaolo*. The interview neither established the falsity of Schwimmer's trial testimony nor did it convince the Court that the jury would have reached a different verdict.

C. As to the Alleged Perjury of Trial Witnesses

The defendant also argues that both Schwimmer and Victor Schlesinger committed perjury at the trial. "Where the newly discovered evidence is the existence of allegedly perjured testimony, the defendant must first demonstrate that perjury was in fact committed." *United States v. Torres*, 128 F.3d 38, 49 (2d Cir. 1997) (citing *United States v. White*, 972 F.2d 16, 20 (2d Cir. 1992)); *United States v. Moore*, 54 F.3d 92, 99 (2d Cir. 1995). A witness commits perjury by willfully giving false testimony concerning a material matter. *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001) (citing *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993)). Perjury is not demonstrated by showing that testimony of a witness is inconsistent with the statements of another witness. *See Gallego*, 191 F.3d at 162; *United States v. Gambino*, 59 F.3d 353, 365 (2d Cir. 1995). Incorrect testimony

resulting from confusion, mistake, or faulty memory, or simple inaccuracies or inconsistencies in testimony likewise do not rise to the level of perjury. *See Monteleone,* 257 F.3d at 219; *Sanchez,* 969 F.2d at 1414-15.

However, once perjury is demonstrated, a new trial is not automatic. "Rather, when a trial has been tainted by false testimony, th[e] [c]ourt is 'called upon to strike a fair balance between the need for both integrity and finality in criminal prosecutions' by determining whether false testimony was prejudicial in the sense that it affected the outcome of the trial." *Stewart,* 433 F.3d at 297 (quoting *Stofsky,* 527 F.2d at 239). In undertaking such review, the court looks at the materiality of the perjury to the verdict and applies one of two well-settled standards that focus on the "extent of the government's awareness of the false testimony prior to the conclusion of the trial." *Id.* (citing *United States v. Wallach,* 935 F.2d 445, 456 (2d Cir. 1991)).

"Where the prosecution knew or should have known of the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Wallach,* 935 F.2d at 457. Indeed, the knowing introduction of false testimony by the government will lead to "virtually automatic" reversal. *Stewart,* 433 F.3d at 297 (quoting *Wallach,* 935 F.2d at 457). This relaxed standard "serves the dual purposes of discouraging prosecutorial misconduct and providing relief from an unfair

conviction." *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)); *see also Perkins v. Le Fevre*, 691 F.2d 616, 619 (2d Cir. 1982).

On the other hand, where the government has no knowledge or is unaware of the perjury, "a new trial is warranted only if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *Wallach*, 935 F.2d at 457; *see also Stewart*, 433 F.3d at 297; *Monteleone*, 257 F.3d at 219.

The defendant argues that this Court should follow the reasoning in *Ortega v. Duncan*, 333 F.3d 102 (2d Cir. 2003), and grant a new trial if it can be shown that a witness is a "demonstrated perjurer." Not only does this argument misconstrue the holding of *Ortega*, but the mere showing that a witness is a "demonstrated perjurer" is not and has never been the standard in the Second Circuit on a motion for a new trial. Indeed, the rule that "[p]erjury in and of itself is insufficient to justify relief under Rule 33..." was recently affirmed in *Stewart*, 433 F.3d at 297, and has been well-established since *Wallach*. 935 F.2d at 457; *see also White*, 972 F.2d at 22 ("[T]he mere fact that [the witness] lied on the witness stand does not automatically entitle [defendant] to a new trial.").

This Court agrees, and is bound, by the holding in *Ortega*, that "a determination that [a witness's] recantation [is] not credible is insufficient to establish that [the witness's] trial testimony was

not perjured.... Rather, the court must weigh all the evidence of perjury before it, including but not limited to the recantation, before reaching this conclusion." *Ortega,* 333 F.3d at 107. Accordingly, this Court has analyzed the additional evidence of perjury that the defendant submitted with the motion and during the evidentiary hearing, and finds it to be plainly insufficient to demonstrate perjury.

The additional evidence presented by the defendant in this case is very different from the type of additional evidence in *Ortega.* Also, in *Ortega* the witness reaffirmed his recantation at the evidentiary hearing on the motion for new trial. *Id.* at 105. The additional evidence proffered in support of the recantation was not hearsay, but admissible evidence that substantiated the recantation. This evidence included a statement from the mother of the witness, who the witness had testified he was with when he observed the crime, that she was not at the crime scene. *Id.* Further, the defendant offered a recantation from the second, and only other, corroborating witness to the crime. *Id.* at 107. Most notably, the defendant showed that the witness had recanted his testimony in two prior unrelated cases.

The additional evidence of perjury in the instant motion for a new trial pales in comparison to the evidence presented in *Ortega.* In this motion the defendant offers a multitude of out-of-court statements from members of the Williamsburg community, and the testimony of Susan Necheles, all of which claim that prior to or after the trial Schwimmer admitted to them that he and

Victor Schlesinger lied at the trial due to a family dispute. In addition, the defendant argues that Schwimmer's incredible responses during cross-examination at the evidentiary hearing demonstrate his willingness and capacity to lie under oath.

The defendant argues that this newly discovered evidence shows that Schwimmer acknowledged conspiring with Victor Schlesinger to provide false testimony. The defendant does not assert that the government knew or should have known about the alleged conspiracy. As such the Court could only find that a new trial is warranted "if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *Wallach*, 935 F.2d at 457; *see also Stewart*, 433 F.3d at 297; *Monteleone*, 257 F.3d at 219.

As the defendant "frankly" admits, "the contents of the statements of these community members would not alone suffice to establish the perjury of Schwimmer and [Victor] Schlesinger in any case." Def. Mem. of Law in Supp. of Rule 33 Mtn. at 6. Rather, the defendant contends that they strongly support the veracity of Schwimmer's recantation and his statements concerning the fabrication of testimony by Victor Schlesinger. The Court disagrees.

First, a number of the out-of-court statements provided to the Court, such as the statement of David Ganz about a conversation occurring near the 2005 Passover, detail hearsay conversations that the affiants or declarants had with Israel

Schwimmer prior to or during the defendant's trial. As such, this evidence is not "newly discovered" and does not meet the threshold requirements of this motion for a new trial.

As to the statements that occurred after the trial, such as the admission to Necheles, these hearsay statements largely detail Schwimmer's motivation for testifying at the trial, that is, the bitter family feud between the family of Jack Schlesinger and the defendant, a fact thoroughly explored and argued by the defendant at trial, and ultimately apparently rejected by the jury. Evidence of this nature that is merely cumulative or impeaching is not an adequate basis for the grant of a new trial. *United States v. Diaz,* 176 F.3d 52, 106 (2d Cir. 1999).

The parts of the hearsay statements that include assertions that Schwimmer or Victor told them they "lied at the trial," are insufficient to establish that Schwimmer or Victor willfully falsified their trial testimony. These hearsay statements can either be viewed as (1) questionable hearsay evidence of perjury; (2) additional evidence of Schwimmer's unsworn recantation; or (3) inadmissible extrinsic impeachment evidence of Schwimmer's repudiation of his recantation. All of the statements suffer from the same evidentiary infirmity; they were not made under oath. Instead, they were all made in the aura of tremendous community pressure, and outside "the formality of a court, the presence of the litigants, and the gaze of a judge [that] induce witnesses to hew more closely to the

truth...."*Mendiola,* 224 F.3d at 593. In striking contrast, Schwimmer repudiated all of his statements of recantation at the hearing while he was under oath and in an open court.

Indeed, one hearsay statement advanced by the defendant is particularly unreliable. The defendant argues that the context of the statements Schwimmer made to attorney Necheles is highly indicative of their reliability because he was speaking to an attorney for the purpose of obtaining "advice and guidance." However, as the defendant argued during the evidentiary hearing in support of admitting Necheles' testimony, in the face of the obvious privilege barrier, the communications were not "made in confidence" because individuals other than the attorney and client were present. See *Denney v. Jenkens & Gilchrist,* 362 F.Supp.2d 407, 412 (S.D.N.Y. 2004) ("It is well-established that the attorney-client privilege is waived if the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the communication to a third party or stranger to the attorney-client relationship"); 8 Wigmore, Evidence § 2311 ("One of the circumstances by which it is commonly apparent that the communication is not confidential is the presence of a third person who is not the agent of either client or attorney").

Here, not only were there other individuals present, which led to a waiver of the privilege, but the circumstances of the meeting with Necheles raise concerns about reliability. Prior to meeting with Schwimmer, Necheles was confronted by Schwimmer's wife who alerted her that she should not meet with her husband because he had

been kidnapped. When Necheles eventually did meet with Schwimmer he was brought to her personal residence by "two or three other men ... all named Schwimmer." Although Necheles inquired whether Schwimmer was there of his own free will, she could not even identify who the other individuals were or why they needed to be present during her important first meeting with her new client.

Putting the unusual circumstances aside, Necheles' testimony substantiated the tremendous community pressure that Schwimmer was under, possibly pushing him to give an untruthful recantation even to her. Necheles testified that Schwimmer told her he was prompted to recant by a desire to clear his conscience and make amends for testifying against another Jew, consistent with the principles of "Maseera" proclaimed by the religious court Beis Din Tzedek. Necheles further explained the definition of the term "mooser," a label that was branded on Schwimmer by certain members of the community. She stated that a "mooser" is somebody who goes to civil authorities and tells about another Jew in the community. With reasonable certainty, this form of community ostracizing that Schwimmer was subjected to is one of those out-of-court influences that could regrettably lead a witness to give a false recantation.

The Court also finds that any alleged perjury was not material to the verdict rendered. As detailed above, independent evidence supported the defendant's conviction on the arson counts. Significantly, the jury was well-aware at the trial

of the bitter family dispute and of the allegations that Victor Schlesinger and Israel Schwimmer fabricated their testimony. Indeed, during the trial the defendant recalled Abraham Weiser to the stand and he stated that he was approached by some of the government witnesses who testified at the trial and that they told him they were lying on the stand "to fix Nat." Trial Tr. at 2451, 2458. The jury heard and apparently rejected this argument. Any additional "new" evidence of the fabrication would be not only be cumulative impeachment, but also immaterial. In other words, if the jurors had this additional hearsay impeachment evidence alleging that Schwimmer and Victor Schlesinger had lied under oath about the statements they overheard, with reasonable certainty, the verdict probably would not have been different.

Finally, the defendant argues that the newly discovered evidence about Victor Schlesinger's involvement in the Foodland Minnesota fraud would have materially affected the jury verdict on the arson counts. This argument is clearly without merit. Impeachment evidence that bears only on credibility is generally not a sufficient basis for obtaining a new trial. *See Reyes,* 49 F.3d at 68 (citing *Mesarosh,* 352 U.S. at 9, 77 S.Ct. 1, 1 L.Ed.2d 1). Although the defendant offered evidence to show that Victor Schlesinger was most likely involved in the Minnesota fraud, this would constitute cumulative impeachment material because the attorney for the defendant cross-examined Victor Schlesinger about whether he was ever involved in a business in Minnesota. *Diaz,* 176 F.3d at 108; *Locascio,* 6 F.3d 924, 949-50

(2d Cir. 1993) (affirming denial of a new-trial motion where newly discovered evidence would merely have been cumulative impeachment material against a witness' credibility). In addition, it is questionable whether Victor's involvement in an alleged fraudulent loan in Minnesota was sufficient to show that his responses at the trial constituted perjury. *See United States v. Petrillo*, 237 F.3d 119, 124 (2d Cir. 2000), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177(2004) (holding that "misleading rather than demonstrably false" testimony is not perjury).

D. As to The Government's Alleged Failure to Disclosure Impeachment Evidence

The Constitution requires the government to disclose to the defendant any information in their possession that is both favorable and material to his guilt or sentence. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This obligation includes information useful solely for impeaching the credibility of a government witness. *Giglio v. United States*, 405 U.S. 150, 153-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). However, while the government is required to disclose material exculpatory evidence, it is not required to disclose evidence that the defendant has sufficient access to or knowledge of to permit him to take advantage of the exculpatory evidence. *See United States v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993) (citing *United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982)).

The Supreme Court has held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *see also Youngblood v. West Virginia,* 547 U.S. 867, ----, 126 S.Ct. 2188, 2190, 165 L.Ed.2d 269, ---- (2006). "Nonetheless, knowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt 'a monolithic view of government' that would 'condemn the prosecution of criminal cases to a state of paralysis.'" *United States v. Avellino,* 136 F.3d 249, 255 (2d Cir. 1998) (citations omitted). Thus, a prosecutor is only obliged to disclose "any information held by those whose actions can be fairly imputed to him — those variously referred to as an 'arm of the prosecutor' or part of the 'prosecution team.'" *United States v. Bin Laden,* 397 F.Supp.2d 465, 481 (S.D.N.Y. 2005); *see e.g., United States v. Zagari,* 111 F.3d 307, 320 n. 13 (2d Cir. 1997); *United States v. Chalmers,* 410 F.Supp.2d 278, 288-90 (S.D.N.Y. 2006).

In the defendant's motion, he claims that the government failed to disclose information concerning an investigation commenced in 2002 by the Chicago office of the Small Business Administration concerning an alleged fraudulent loan obtained by Foodland Industries, which was allegedly

co-owned by Victor Schlesinger. The investigation ended in June 2004. After an investigation, the United States Attorney's office for the District of Minnesota formally declined to prosecute.

After conducting an evidentiary hearing at which numerous government agents involved in the Minnesota investigation testified, the defendant failed to demonstrate that any of the investigators or prosecutors in the instant case had access to or knowledge of any undisclosed impeachment material concerning Victor Schlesinger. Indeed, the evidence adduced at the hearing showed that it was the defendant's son Sam Schlesinger who prompted the SBA to open an investigation into Gary Schlesinger's business activities in Minnesota. Accordingly, the Court finds that government had no knowledge, actual or imputed, of the Minnesota investigation.

Finally, the evidence shows that the defendant had sufficient knowledge of the Minnesota investigation prior to the trial. Victor Schlesinger was cross-examined at the trial by the defendant's counsel about whether he had any business activities in Minnesota. "Where the challenged false testimony was elicited by the defense, rather than the prosecution, that circumstance tends to establish the government's unawareness of the perjury." *United States v. Damblu,* 134 F.3d 490, 493 (2d Cir. 1998) (citing *United States v. Wong,* 78 F.3d 73, 81-82 (2d Cir. 1996)). Here, all the evidence indicates that the defendant had

knowledge of the alleged impeachment evidence prior to the trial. Accordingly, the Court finds that the government did not improperly suppress the subject information in violation of *Brady* or *Giglio*.

III. CONCLUSION

For all the foregoing reasons, it is hereby

ORDERED, that the defendant's motion for a new trial is DENIED in all respects.

SO ORDERED.

Dated: Central Islip, New York
July 17, 2006

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

NAT SCHLESINGER, also known as "Naftule Schlesinger" and "Zvi Pollack," HERMAN NIEDERMAN, and GOODMARK INDUSTRIES, INC.,

Defendants.

Criminal No. 02-485 (ADS)(ARL)
July 26, 2006

Roslynn R. Mauskopf, United States Attorney, Eastern District of New York by Lawrence Philip Ferazani, Cynthia M. Monaco, Richard Lunger, Assistant U.S. Attorneys, Central Islip, NY, for U.S.

Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP by Herald Price Fahringer, Esq., Jeremy L. Gutman, Esq., New York City, for Defendants Nat Schlesinger and Goodmark Industries, Inc.

Michael L. Soshnick, Esq., Adrian L. Diluzio, Esq., Mineola, NY, for Defendant Nat Schlesinger.

ORDER

SPATT, *District Judge*.

Presently before the Court is a third motion by defendants Nat Schlesinger and Goodmark Industries, Inc., (the "Defendants"), for a new trial based on newly discovered evidence. In particular, the Defendants allege that the government assisted a trial witness, Bradley Lanes, in his efforts to obtain benefits in connection with his sentencing and has otherwise afforded him undisclosed preferential treatment in exchange for his testimony against Nat Schlesinger. The undisclosed beneficial treatment alleged to have been provided by the government includes: (1) consenting to the request by Lanes to transfer his case to this Court for sentencing, (2) consenting to adjournments of his sentencing to a date after the scheduled sentencing of Schlesinger; and (3) refraining from seeking a revocation of bail or alteration of the conditions of bail after Lane committed a post-release crime.

It has long been the law that the government has a duty to disclose evidence favorable to the accused when it is material to guilt or punishment. *See Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This duty under *Brady* to disclose is not limited to "exculpatory" information, but it also includes information that could be used to impeach government witnesses, so-called Giglio material. *See Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

The Supreme Court recently provided a clear summary of the rules governing an alleged *Brady* violation:

> A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused. This ... Brady duty extends to impeachment evidence as well as exculpatory evidence, and Brady suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor. Such evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, although a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. The reversal of a conviction is required upon a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Youngblood v. West Virginia, 547 U.S. 867, ----, 126 S.Ct. 2188, 2190, 165 L.Ed.2d 269, ---- (2006) (citations and quotations omitted).

Stated succinctly, the Second Circuit has recently held that a Brady violation has three components: "The material evidence 'must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [government], either willfully or inadvertently; and prejudice must have ensued.'" *United States v. Madori,* 419 F.3d 159, 169 (2d

Cir. 2005) (quoting *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)); *see also United States v. Rivas,* 377 F.3d 195, 199 (2d Cir. 2004).

Information is material under *Brady*" if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Pennsylvania v. Ritchie,* 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Id.* (citations omitted); *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (holding that the state's obligation under Brady turns on the "cumulative effect of all such evidence suppressed by the government"); *Madori,* 419 F.3d at 169 ("Impeachment evidence is evidence 'having the potential to alter the jury's assessment of the credibility of a significant prosecution witness."); *see also United States v. Avellino,* 136 F.3d 249, 255 (2d Cir. 1998); *United States v. Payne,* 63 F.3d 1200, 1209 (2d Cir. 1995).

Here, the Court need not determine whether the government actually failed to disclose the potential impeachment evidence because such information would not have been material to the verdict. Along with numerous other witnesses, Lanes testified at the trial regarding the insurance fraud. Lanes stated that he was an insurance adjuster, and that he received more than $35,000 in cash bribes from Schlesinger in exchange for

fraudulently inflating insurance claims for three fires that occurred in 1987, 1990, and 1991 at the Wallabout Street factory. This testimony was substantially corroborated by five other witnesses, namely, Seymour Berson, Joseph Panico, Jeffrey L. Fougere, Thomas Tesoriero, and John Cronin.

In addition, the credibility of Lanes was fully explored at the trial. Lanes testified that in the 1990's he plead guilty to federal charges of mail fraud, tax evasion, and conspiracy. He understood when he plead guilty that he was subject to more than ten years imprisonment and a $250,000 fine. Lanes explained that he then entered into a cooperation agreement with the government, but that in 2004 he was notified by the government that he had breached the agreement by being arrested and charged by the Broward County Sheriff's Office with possession of cocaine and tampering with evidence, and by falsely reporting to the government that he had not used cocaine. Due to the breach of the cooperation agreement, he understood that he would no longer be eligible for a 5K letter.

The testimony also established that, although Lanes breached his cooperation agreement, he nonetheless provided voluntary assistance to the government in testifying against Schlesinger. When asked by the prosecutor, "Do you believe that testifying here today, even without a cooperation agreement, will help you in some fashion when you are sentenced?" Lanes replied,

"I don't know. I've been cooperating with the government for nine years right now, and I'm not about to give up over a mistake I made." Trial Tr. at 425.

The Court finds that the mass of evidence against Schlesinger with regard to the insurance fraud, along with the substantial impeachment information disclosed to the jury as to Lanes, renders immaterial any alleged undisclosed beneficial treatment by the government. With reasonable certainty, such impeachment information, if proven, would have no affect on the outcome of the verdict, or in the assessment by the jury of the credibility of Lanes.

Moreover, the three items of alleged "new evidence" of secret preferential treatment are speculative and, in any event, without *Brady* merit. First, it was counsel for Lanes who, while aptly advancing the interests of his client, filed a motion requesting that his case be transferred to this Court for sentencing due to the Court's familiarity with his client's background. The letter filed by Lanes indicates that the government's consent was obtained for the motion, but the Court notes that such consent was not required to transfer the case to another judge in the Eastern District. *See* Rule 50.3(c) of the Guidelines for the Div. of Bus. Among Dist. Court Judges in the Eastern Dist.

Second, the adjournment of his sentence — a routine application often sought by unincarcerated defendants — was requested by Lanes, who resides in Florida, because he was unable to purchase an inexpensive flight to New York and bring his

father with him for emotional support. A scheduling request of this nature is generally granted by the Court. Contrary to the Defendants suggestion, the rescheduled date of August 4, 2006, had nothing to do with the date scheduled for the sentencing of Schlesinger. Indeed, the timing of Lanes' sentencing is totally irrelevant to the Defendants' instant motion. Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, the Defendants can file a motion for a new trial based on newly discovered evidence within 3 years after the verdict or finding of guilty. *See* Fed.R.Crim.P. 33(b)(1).

Finally, the Defendants claim that they have recently discovered that the government did not seek a revocation or alteration of Lanes' bail when he was arrested on drug charges simply ignores the testimony Lanes provided at the trial in this case. The Defendants and the jury were fully aware at the trial that Lanes had been arrested and charged with possession of cocaine while he was out on bail, and that as a result of such post-release offense, his cooperation agreement was terminated. Therefore, any allegation that the government failed to disclose such information is completely unfounded.

Accordingly, the motion for a new trial is DENIED, in all respects.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of March, two thousand and eight,

UNITED STATES COURT OF APPEALS
FILED
MAR 20 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

United States of America,

Appellee,

v.

Nat Schlesinger aka
Nat Schlesinger aka
Naftule Schlesinger aka
Zvi Pollack, Goodmark
Industries, Inc,

Defendant-Appellant.

05-3021-cr(L)
05-5839-cr(con)
06-3551-cr(con)
06-3555-cr(con)

Nat Schlesinger and Goodmark Industries, Inc having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk

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